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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-5097

HAROLD EUGENE HUFFMAN,
Petitioner,

v.

FAYE I. BOERSEN,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NEBRASKA

BRIEF FOR THE PETITIONER

LEO EISENSTATT
707 City National Bank Building
Omaha, Nebraska 68102
Attorney for Petitioner

Of Counsel:
J. PATRICK GREEN

Washington, D. C. THIEL PRESS 202 [illegible]

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OPINION BELOW

The Nebraska Supreme Court dismissed petitioner's appeal from the District Court of Hall County, Nebraska without rendering an opinion. The journal entry appears in the records of the Nebraska Supreme Court in the journal designated ZZZ, at page 343 (A. 75).

JURISDICTION

The Nebraska Supreme Court's order dismissing Huffman's appeal was entered on June 14, 1971. Huffman, pro se, filed his petition for writ of certiorari on July 16, 1971 with appendices which included (i) motion to proceed in forma pauperis, (ii) affidavit of forma pauperis, (iii) certificate of service, and (iv) substantial portions of the record below.

On December 14, 1971, the petition for writ of certiorari to the Supreme Court of the State of Nebraska, leave to proceed in forma pauperis and for appointment of counsel was granted. Appointment of counsel for petitioner was entered on December 20, 1971.

The jurisdiction of this Court rests on 28 U.S.C., § 1257(3).

QUESTIONS PRESENTED

1. Where Petitioner was admittedly indigent, did the State of Nebraska violate Petitioner's constitutional rights under the Due Process and the Equal Protection Clauses of the Fourteenth Amendment, by dismissing his appeal to the Nebraska Supreme Court for failing to file a $75.00 cost security (bond or cash) in an action for marraige annulment and determination of paternity?

2. Are the cost security, brief, printing and filing fee requirements of the State of Nebraska violative of an indigent's Fourteenth Amendment due process and equal protection rights which deny his right to appeal to the Nebraska Supreme Court in a marriage annulment and determination of paternity action?

3. Did the trial court deny Petitioner due process of law when, after being informed of his incarceration in the state penitentiary and inability to afford counsel, due to his indigency, it proceeded to try the annulment and paternity action in his absence?

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

1. UNITED STATES CONSTITUTION

Fourteenth Amendment:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. STATUTES

The Nebraska Statutes, the constitutionality of which are challenged in this action are:

(a) Section 25-1912, Vol. 2, R.S. Neb. 1943 (R.I. 1964), providing in pertinent part that:

> "The proceedings to obtain a reversal, vacation or modification of judgments and decrees rendered or final orders made by the district court, . . . shall be by filing in the office of the clerk of the district court . . . within one month after the rendition of such judgment or decree, or the making of such final order, . . . a notice of intention to prosecute such appeal signed by the appellant . . . or his . . . attorney of record, and, . . . by depositing with the clerk of the district court the docket fee required by law in appeals to the Supreme Court. . . . an appeal shall be deemed perfected, and the Supreme Court shall have jurisdiction of the cause when such notice of appeal shall have been filed, and such docket fee deposited in the office of the clerk of the district court, . . . and no step other than the filing of such notice of appeal and the depositing of such docket fee shall be deemed jurisdictional. . . ."

(b) Section 25-1914, Vol. 2, R.S. Neb. 1943 (R.I. 1964), providing in pertinent part that:

> "On appeal in any case taken from the district court to the Supreme Court the appellant . . . shall, within one month next after the rendition of the judgment or decree . . . sought to be reversed, vacated or modified, . . . file in the district court a bond or undertaking in the sum of seventy-five dollars to be approved by the clerk of the district court, conditioned that the appellant shall pay all costs adjudged against him in the Supreme Court; or, in lieu thereof, shall make a cash deposit with said clerk of at least seventy-five dollars for the same purpose; *Provided,* that if a supersedeas bond is executed no bond for costs shall be required. The giving of either form of bond or the making of such deposit shall be certified to by the clerk of the district court in the transcript for the Supreme Court. The appeal may be dismissed on motion and notice in the Supreme Court if no bond has been given and certified in the transcript, or within such additional time as may be fixed by the Supreme Court for good cause shown."

(c) Section 25-1919, Vol. 2, RS Neb. 1943 (RI 1964) providing in pertinent part that:

> "The Supreme Court shall by general rule provide for the filing of briefs in all causes appealed to said court. . . ."

(d) Section 33-103, Vol. 3, R.S. Neb. 1943 (R.I. 1968), providing in pertinent part that:

> "At the time of filing an appeal, or original suit, or proceeding in the Supreme Court there shall be paid to the clerk the sum of twenty dollars as a docket fee, and the appellee or adverse party shall pay a docket fee of five dollars upon entering his appearance, or filing a motion, pleading or brief in the case. These payments shall cover all clerk's fees except that the clerk shall be paid for each copy ordered of any pleading, record or other paper or

any part thereof, for each ten words, one cent; for certificate and seal, fifty cents."

3. RULES OF THE NEBRASKA SUPREME COURT

(a) Rule 1a, which is in the language of Section 25-1912 (a) supra.

(b) Rule 3b, providing that:

"Security for Costs. An appeal will be dismissed upon motion and notice for failure to comply with section 25-1914, R.R.S. 1943, unless additional time for compliance be granted for good cause shown."

(c) Rule 9a providing in pertinent part that "all briefs shall be printed unless otherwise allowed by the court on good cause shown."

(d) Rule 9d providing that:

"Cost of Printing. When the parties or their attorneys furnish their printed briefs in conformity to the rules of this court it shall be the duty of the clerk to tax a fee therefor against the unsuccessful party to be collected and paid to the successful party as other costs. Costs shall not be taxed for the printing of a reply brief except such part as is in answer to a cross-appeal, nor for printing briefs unless printed, served, and filed in conformity with the rules of this court. The amount taxed shall not be in excess of $2.60 per page but in no event to exceed the actual cost of printing. Proof of the actual cost of printing shall be submitted to the clerk with the filing of the brief. The total number of pages that may be taxed as costs shall in no event exceed 75."

(e) Rule 10, providing that:

"Failure to Comply. The clerk shall refuse to file any brief not prepared in accordance with these rules and shall immediately notify counsel of the objections thereto."

(f) Nebraska has no statute providing for waiver of filing fees, security for costs, printing of briefs, or providing for

appointment of counsel in annulment of marriage actions in the trial court or on appeal. On January 4, 1972, L.B. 1120 was introduced in the Nebraska Legislature to provide for proceedings in forma pauperis. Inter alia it provides for the waiver of filing fees and security for costs by indigents and that the cost of printing of briefs shall be paid by the counties. The bill is not retroactive and no present information exists as to whether or not it will be passed in its present form or in amended form.

STATEMENT OF THE CASE

On March 5, 1969 respondent, using her maiden name of Faye I. Lavender, married petitioner at Las Vegas, Clark County, Nevada (A. 1)

On November 5, 1970 respondent filed a petition for annulment of said marriage in the District Court of Hall County, Nebraska (Docket 58, page 140, Case No. 17416), alleging that on the date of said marriage she was legally married to Richard A. Boersen. She further alleged that on April 24, 1969 a divorce decree was entered in the District Court of Hamilton County, Nebraska, dissolving her marriage to Boersen, which did not become final until October 29, 1969 (A. 1).

On November 9, 1970 summons was served upon Huffman at the State Penal Complex in Lincoln, Nebraska (A. 2, 3.) He was serving a sentence for forgery and uttering forged instruments (*State of Nebraska v. Harold Huffman,* April 10, 1970, 185 Neb. 417, 176 N.W.2d 506, and post-conviction opinion May 7, 1971, 186 Neb. 809, 186 N.W.2d 715).

Huffman prepared and filed all pleadings pro se.

On November 12, 1970 Huffman filed:

(a) separate pleadings entitled Motion to Dismiss (A. 4.5), Motion to Quash (A. 6) and Demurrer (A. 7) alleging:

(1) Lack of jurisdiction in the court because of prior criminal trials, in which the same judge refused to rule on the validity of this marriage, and

(2) Because of the doctrine of unclean hands, respondent was barred from seeking an annulment;

(b) other pleadings entitled Motion to Supress (A. 8, 9) and Objection (A. 10) denying Faye Boersen's right to adduce evidence because of her prior acts, which invoked the doctrine of unclean hands and fraud.

(c) a Reply (A. 11, 12, 13) alleging he was incarcerated in the State Penitentiary, that a child born to Faye Boersen on October 31, 1969 was Huffman's son and not the son of Richard A. Boersen and in different form the allegations similar to the other pleadings.

On November 17, 1970 Huffman filed:

(a) a Motion for Appearance (A. 14) alleging that he was incarcerated in the State Penitentiary, that the trial judge had authority to order the warden to produce Huffman in person at the hearing, that he had no legal counsel, was representing himself pro se, and asked for the right to be present to cross-examine Faye's witnesses and to call witnesses on his own behalf.

(b) a Motion to strike the name of Faye I. Boersen and replace it with Faye I. Huffman (A. 15) on the ground that the marriage to Huffman was not void.

(c) two Motions (A. 16, 18) asking that the affidavits of himself and Merle Burside be admitted into evidence (A. 17, 19, 20, 21, 22).

On November 24, 1970 Huffman filed an "Objection" (A. 23) objecting to any proceeding where Faye would present evidence and which would deny his right to examine, inspect and object to any of her evidence; and which would deny his right of cross-examination. He stated that he was appearing pro se, had no legal counsel, was unable to obtain counsel because "of his pauperis nature" and to deny him the above rights would be illegal, unlawful and contrary to the Constitution of the United States.

On November 25, 1970 Huffman filed his "Defendant's Resistance and Counter-Suit" (A. 24-44 incl.) of 22 pages which was a combination of a responsive pleading, a recitation of much evidence, references to cases pending in the Federal District Court, and argument.

On March 16, 1971 respondent's attorney ex parte requested the court to set the case for trial (A. 45) which the court granted. The court found that all of Huffman's motions, objections, briefs, affidavits, etc., filed prior to the "Resistance and Counter-Suit" were irrelevant and without merit and were overruled, and set the case for trial on March 26, 1971 at 1:30 p.m. (A. 45). On March 19, 1971 this was solemnized by a journal entry (A. 46).

On March 22, 1971, Huffman was served with a copy of said journal entry and wrote the judge a letter demanding to be present, having no counsel, due to his pauperis nature (A. 48).

On March 26, 1971 trial was held before the Honorable Donald H. Waver, District Judge, in Grand Island. (A. 49, 58, 59, 60). Huffman was not present, nor was any attorney present representing him. Faye's attorney was present. Faye was the only witness called. She testified that she was first married to Richard Boersen on June 12, 1964 in Grand Island, that Boersen secured a divorce in Hamilton County, Nebraska on April 24, 1969. (She had filed the divorce action in February, 1969 and Boersen had counterclaimed.) A certified copy of that decree of divorce appears at (A. 63 offered at 59) was admitted into the record. She testified she was married to Huffman on March 5, 1969 in Las Vegas, Nevada and at the time was

married to Richard A. Boersen, and asked that the Huffman marriage be declared void. (A. 60.) The court granted the annulment and found the resistance and counter-suit without merit and dismissed it, and the order of annulment was entered (A. 49, 50, 60).

On April 9, 1971 Huffman filed with the clerk of the trial court a notice of appeal, a praecipe for a bill of exceptions, a praecipe for transcript and a motion to have the court enter an order directing the clerk to prepare the transcript and bill of exceptions, wherein he stated that he forwarded a $20.00 docket fee and the bond as required by law (A. 51, 52, 53, 54).

On May 4, 1971 the clerk certified to the Supreme Court of Nebraska a copy of the transcript and bill of exceptions, and that no cash bond was deposited but only the $20.00 docket fee was received (A. 55).

On May 19, 1971 in the Nebraska Supreme Court Faye's attorney filed a motion to dismiss Huffman's appeal (A. 67) for the reason that no bond, undertaking or cash deposit had been given as required by Section 25-1914, R.R.S. Neb. 1943. On the same date he filed a notice of hearing addressed to Huffman (A. 68), stating that the motion to dismiss would be heard by the Nebraska Supreme Court on June 1, 1971 at 9:00 A.M. Proof of service of the notice was also filed stating that a copy of the motion to dismiss and the notice of hearing was mailed to Huffman at the penitentiary (A. 69).

On May 25, 1971 Huffman filed his "Objection," objecting to the motion to dismiss the appeal alleging that he had paid the $20.00 docket fee, that he had submitted his brief to the Gant Publishing Co. for printing the brief, that he was indigent and he submitted his affidavit of poverty. He pleaded that to grant the motion would deny him access to the courts because "of his pauperis nature," would unconstitutionally deny him his rights to defend himself, that Nebraska statute 25-1914 was unconstitutional as it was being applied to him, citing *Boddie v. Connecticut*, 401

U.S. 371 (1971), and asked that the requirement of the bond be waived (A. 70, 71).

At the same time he filed a "Motion to Proceed in Forma Pauperis" and his affidavit. He cited *Boddie v. Connecticut*, 401 U.S. 371 (1971). (A. 72, 73).

The affidavit states that he has no bonds, security or property, that he is incarcerated in the Nebraska Penal Complex, that his only income is 30¢ per day prison wages, from which he paid the $20.00 docket fee, that he is paying for the printing of his brief which was then at Gant Publishing, that he has no money and that no one is holding any money for him (A. 73).

He also filed a second "Motion" stating that if the appeal is dismissed, that in view of *Boddie v. Connecticut* the mandate be stayed to allow him to file a petition for writ of certiorari to the United State Supreme Court (A. 74).

On June 14, 1971 the Nebraska Supreme Court dismissed the appeal on the motion of Faye, taxing the costs to Huffman (A. 75) and entered an order staying the mandate until September 14, 1971 (A. 76).

On July 16, 1971 Huffman filed in the Supreme Court of the United States his petition for writ of certiorari with appendix. Included was a motion to proceed in forma pauperis, affidavit and motion for appointment of counsel.

On July 28, 1971 Huffman filed a motion for an indefinite stay of the mandate until the Supreme Court of the United States ruled on his Petition for Writ of Certiorari filed on July 16, 1971 (A. 77). This was granted by the Nebraska Supreme Court (A. 78).

Huffman had prepared a typewritten brief pro se, which was delivered to Gant Publishing Co. in Lincoln, Nebraska. The cost was $88.58 and was paid on June 14, 1971 from his account in the inmates fund at the penal complex. On June 16, 1971 Mr. Paul, the president of Gant Publishing Co., attempted to deliver the printed briefs to the Clerk of the Nebraska Supreme Court, which were refused, on the

grounds that the case had been dismissed. Mr. Paul then delivered the briefs to Huffman. Huffman's funds at the Nebraska Penal Complex, after deducting the $20.00 docket fee and the $88.58 printing cost, did not exceed the sum of $5.00. Huffman had no other funds or resources available to him, directly or indirectly. (Stipulation of Counsel–Appendix B to this Brief.)

SUMMARY OF ARGUMENT

1. The respondent, Faye I. Boersen, brought an action in the Hall County District Court of Nebraska situated in Grand Island, to annul her marriage to the petitioner, Harold Eugene Huffman. By his pleadings filed in the trial court, Huffman sought to uphold the validity of this marriage and to establish his paternity of the child born to Faye on October 31, 1969. The trial court granted the annulment and dismissed Huffman's "Resistance and Counter-Suit."

Throughout these proceedings Huffman has been incarcerated in the Nebraska Penal Complex at Lincoln, Nebraska. He was not allowed to be present at the trial or at the argument in the Nebraska Supreme Court. All documents on Huffman's behalf, until appointment of counsel by this Court, were prepared and filed pro se.

2. The statutes of Nebraska and the rules of its Supreme Court impose substantial monetary requirements for appeals. These monetary requirements are insurmountable to the indigent and effectively prevent him from securing access to the appellate court. In Nebraska the appellant needs in hand (i) $20.00 for a docket fee, (ii) $75.00 for security for costs, (iii) payment to a printer of the cost of printing the brief (15 copies in the Supreme Court, at least one copy for the attorney for the adverse party and at least one copy for himself). Other costs which may or may not be required in advance are the court reporter's statutory charge for preparation of the Bill of Exceptions and clerk's certification of the notice of appeal.

By statute and court rule, therefore, it is required that these fees be paid, security for costs be furnished, and the other charges be met in order to get the appeal lodged and to stay in the appellate court in order to be heard.

There is no statute or court rule waiving these financial requirements for the indigent. By the invidious discrimination of such financial requirements, the poor appellant in Nebraska is denied the right to secure review of his cause.

3. The Nebraska Constitution guarantees all of its citizens in all civil cases the right to appeal to the court of last resort, the Nebraska Supreme Court. This right by that court's own pronouncements, is guaranteed without regard to the merit, or the lack thereof of the appellant's cause. It is irrelevant that there be any creditable bases that errors were committed in the court below.

Huffman filed the jurisdictionally-required notice of appeal and paid the $20.00 docket fee. He made arrangements to secure a printed brief and paid the printer $88.58. At this point he had less than $5.00 remaining to him with no other funds to provide the $75.00 security for costs. Faye filed her motion to dismiss the appeal for this omission pursuant to Section 25-1914 R.R.S. Neb. 1943. The Nebraska Supreme Court dismissed the appeal in the face of Huffman's Objection, Motion to Proceed in Forma Pauperis and Forma Pauperis Affidavit.

The application of this Nebraska statute to Huffman worked an invidious discrimination against him, which is constitutionally impermissible.

In *Boddie v. Connecticut*, 401 U.S. 371 (1971), this Court held it a denial of due process to prevent an indigent plaintiff access to the state court in a divorce action because of her inability to pay the initial filing fee and service of process fee.

Because of *Boddie*, it then follows that the rationale of *Griffin v. Illinois*, 351 U.S. 12 (1956), applies to the appeal of causes involving matrimonial and family relationships.

The Equal Protection Clause prevents a state from denying an indigent's right to appellate review.

If appeal from a conviction for violation of a traffic ordinance (*Williams v. Oklahoma City*, 395 U.S. 458 (1969)), and if appeal from a sentence or a fine on a conviction of a misdemeanor (*Mayer v. City of Chicago*, 30 L. Ed. 2d 372 (1971)), cannot be denied the indigent because of the Equal Protection Clause, then under *Griffin* appeal cannot be denied in an action involving matrimonial and parental rights. In such cases appellate review is an integral part of the adjudicatory process.

Cost recoupment and resource allocation by the state are antithetical to the Equal Protection Clause. Vital state services such as resort to the courts are not to be made available on the basis of ability to pay. (Compare *Harper v. Virginia*, 383 U.S. 663 (1966), denying a $1.50 poll tax as a prerequisite to voting; and *Shapiro v. Thompson*, 394 U.S. 618 (1969), denying application of length of residence and tax-paying ability to eligibility to receive welfare benefits.)

It is irrelevant to the issue involved that the security for costs in Huffman's case was for the protection of the adverse party. It is a state-imposed condition and is as effective in denying justice because of poverty as the filing fee paid to the state.

4. Huffman was denied due process of law when the trial court refused, upon his repeated requests, to order him brought to the place of trial. The state permitted him to be served with summons at the state penitentiary and then refused to permit him to be present at the trial. The giving of notice of suit by the state was a nullity if the state physically prevented him from being present at the hearing. Due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims through the judicial process must be given a meaningful opportunity to be heard. This encompasses the right to be present to confront adverse witnesses and present evidence and argue orally.

ARGUMENT

I. THE COSTS OF APPEAL TO THE NEBRASKA SUPREME COURT IN A CIVIL CASE ARE SUBSTANTIAL AND ARE AN INSURMOUNTABLE BARRIER TO THE INDIGENT.

There are two jurisdictional steps that must be followed to perfect an appeal from the District (trial) Court to the Nebraska Supreme Court, and these must be performed within the times prescribed. The pronouncement by the trial court is the rendition of the judgment, decree or final order and it determines the dates required for filing rather than the date when the written orders are signed or entered of record.

There are other requirements that are not clothed with the sanctity of jurisdictional requirements but they can cause the same result—loss of the right to appeal.

All of the steps in the process have a financial require- to a greater or lesser degree.

1. A notice of appeal must be filed and a docket fee of $20.00 must be paid within one month after the rendition sought to be reversed. The notice of appeal is filed in and the docket fee paid to the clerk of the district court (Sec. 25-1912, R.R.S. Neb. 1943).

2. (a) If there is a money judgment, a supersedeas bond must be filed to prevent execution of the judgment. The amount of the supersedeas bond is set by the district court and must be filed within twenty days of the rendition (Sec. 25-1916, R.R.S. Neb, 1943). If filed, it also acts as a cost bond (Sec. 25-1914, R.R.S. Neb. 1943).

(b) If there is no money judgment or the party appealing does not desire to supersede the judgment, a cost bond or cash deposit in the amount of $75.00 must be filed in the district court within one month after the rendition. If not filed, the appeal is subject to dismissal on motion of the appellee (Sec. 25-1914, R.R.S. Neb. 1943, and Supreme Court Rule 3b).

3. (a) Praecipe for transcript and request for bill of exceptions should also be filed at the same time as the notice of appeal and the payment of the docket fee within the one-month period of time.

(b) The clerk of the district court delivers a copy of the praecipe and endorsements to the court reporter and sends a copy to the clerk of the Supreme Court (Supreme Court Rule 7c).

(c) The court reporter delivers the bill of exceptions to the clerk of the district court within two months from the filing of the praecipe. He is entitled to be paid and the appellant is taxed the cost thereof at the rate of 45¢ per 100 words (Sec. 24-342, R.R.S. Neb. 1943).

(d) Upon receipt of the bill of exceptions from the court reporter, the clerk of the district court files it and notifies all parties and the clerk of the Supreme Court of the date of filing (Supreme Court Rule 7d).

4. If an extra copy of the notice of appeal is filed with the original in the District Court, the District Court Clerk certifies it to the Supreme Court and it reduces the cost of an additional copy by approximately 50¢. There is a charge for the certification which is in addition to the Docket Fee and normally is paid at the time the Notice of Appeal is filed.

5. The Transcript is filed in the Supreme Court within one month from filing Notice of Appeal (Sec. 25-1912, R.R.S. Neb. 1943).

6. Appellant must file his brief within one month from the expiration of the time allowed by court rules for preparing and filing the Bill of Exceptions, and shall file proof that service was made on or before brief day (Supreme Court Rule 11a(1)). The brief must be printed (Supreme Court Rule 9).

7. Within one month after the appellant has served and filed his brief, the appellee shall file his brief with proof of service (Supreme Court Rule 10a(2)).

8. Within ten days after the appellee has served and filed his brief, the appellant may serve and file a reply brief (Supreme Court Rule 11a(1)).

9. The costs of printing the brief are paid initially by the party submitting the brief. Costs are taxed to the unsuccessful party. The maximum that the successful party can recover as costs for his printing bill is $195.00 (75 pages at $2.60 per page) (Supreme Court Rule 9(d)).

The foregoing summary indicates the financial needs to appeal any civil case to the Nebraska Supreme Court. It shows that in addition to being able to prepare the various notices, praecipes and drafts of briefs there is a requirement of fees to the Clerk of the District Court for his certificates, the Court Reporter for the Bill of Exceptions, the $20.00 docket fee, the $75.00 security for costs, and the brief printing charge (Huffman's was $88.58).

II. THE STATE OF NEBRASKA HAS GUARANTEED TO ALL ITS CITIZENS A RIGHT TO BE HEARD IN ITS SUPREME COURT. HAVING GRANTED THE RIGHT TO BE HEARD, THE STATE CANNOT THEN WITHDRAW IT FROM THOSE CITIZENS UNABLE TO PAY THE COURT COSTS INVOLVED IN AN APPEAL. NEBRASKA DENIED HUFFMAN THE EQUAL PROTECTION OF THE LAW WHEN ITS SUPREME COURT DISMISSED HIS APPEAL BECAUSE OF HIS INABILITY TO POST A COST BOND.

Article I, Section 24 of the Nebraska Constitution provides that:

> "The right to be heard in all civil cases in the court of last resort, by appeal, error or otherwise, shall not be denied."

This constitutional right to appeal is reconfirmed in Section 25-1911, Vol. 2, R.S. Neb. 1943 (R.I. 1964), and is supported by a long line of Nebraska cases, e.g. *Ferber v. Leise*, 97 Neb. 795, 151 N.W. 307, 308 (1915).

However, while the right to appeal is guaranteed, the Nebraska court has held that this right is subject to the imposition of reasonable rules and regulations as the Legislature shall prescribe. *Weiner v. State*, 179 Neb. 297, 137 N.W.2d 852 (1965). One of the regulations prescribed by the Legislature, which the Nebraska court has upheld, is the requirement of a cost bond on appeal. *School District v. Traver*, 43 Neb. 524, 61 N.W. 720 (1895).

While the state's power to prescribe reasonable rules and regulations governing the course of appeal cannot be doubted, those rules and regulations cannot operate so as to work an invidious discrimination among citizens. *Griffin v. Illinois*, 351 U.S. 12, 18, 19 (1956). As this Court held in *Griffin*,

> "There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. [Citing cases.] But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. . . . Consequently at all stages of proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations."

This rule was reaffirmed in *Williams v. Oklahoma City*, 395 U.S. 458, 459 (1969), and was extended to a defendant desiring to appeal from a conviction and jail sentence imposed for violation of a City ordinance, a proceeding treated by Oklahoma as a quasi-criminal. In *Williams v. Oklahoma City* this Court held that:

> "This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned dis-

tinctions that can only impede open and equal access to the courts.' [Citing cases.]

". . . . the decision of the Court of Criminal Appeals wholly denies any right of appeal to this impoverished petitioner, but grants that right only to appellants from like convictions able to pay for the preparation of a 'case-made.' This is an 'unreasoned distinction' which the Fourteenth Amendment forbids the State to make."

Finally, in *Mayer v. City of Chicago*, 30 L. Ed. 2d 372 (1971), this Court extended the right to a free appeal to an indigent defendant who had been convicted of a misdemeanor and sentenced to pay a fine. The Court noted (page 379) that: "The size of the defendant's pocketbook bears no more relationship to his guilt or innocence in a nonfelony case, than in a felony case." It then went on to hold that:

"Griffin does not represent a balance between the needs of the accused and the interests of society; its principle is a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way. The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed. The State's fiscal interest is, therefore, irrelevant. Cf. Shapiro v. Thompson, 394 U.S. 618, 633 (1969)."

The logical progression, from *Griffin*, dealing with the defendant sentenced to the penitentiary to *Mayer*, dealing with the defendant who has been fined, mandates the further extension of the *Griffin* analysis to a party appealing in a civil case. However, before dealing with this broader issue, we note the special treatment accorded the parties to matrimonial litigation in *Boddie v. Connecticut*, 401 U.S. 371 (1971), which mandates the extension to them of a free appeal under the *Griffin* analysis.

In *Boddie*, supra, this Court held that an indigent plaintiff could not be denied access to the state courts in a

divorce suit solely because of her inability to pay an initial filing fee and service of process fee. The majority opinion in *Boddie* is bottomed upon the due process clause of the Fourteenth Amendment and scrupulously avoids passing upon equal protection questions unnecessary to the decision. However, there are substantial equal protection overtones in the Court's opinion. In *Boddie*, the Court held that:

> "We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship. The requirement that these appellants resort to the judicial process is entirely a state-created matter. Thus we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so" (at p. 382).

In *Boddie*, this Court held that the indigent had a right to free access to the means which the state had prescribed for dissolving the marital relationship. In matrimonial cases, as in criminal cases, appellate review has become an integral part of the system for finally adjudicating rights. See *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). If an indigent defendant has a right to free access to the means provided by the State for adjusting matrimonial relationships, he has a right to access of all those means. What this Court in *Griffin* (at 19) said of criminal cases is equally applicable to matrimonial cases:

> ". . . Thus to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside. . . . Such a denial

> is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law. There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."

In *Boddie*, as in the criminal cases that had preceded it, this Court noted that ability to pay fees was not rationally related to the merits of a particular litigant's claim. What was said of the initial petition to dissolve a marriage in *Boddie* is equally applicable at the appellate level. Ability to pay fees or provide security for costs is no more related to the merits of a claim on appeal than it is at a trial.

In *Boddie*, this Court also rejected arguments based on cost recoupment and resource allocation as a justification for the imposition of cost requirements on indigent parties to matrimonial litigation. This reasoning is applicable at the appellate level. Arguments based on resource allocation or cost recoupment are bottomed on the concept of justice as a commodity which the state purveys. Such a concept is antithetical to the theory embodied in the Equal Protection Clause. *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969). Carried to the logical conclusion, arguments based on resource allocation or cost recoupment (market concepts) would allow the state like any other rational purveyor of a commodity to so set its fees as to maximize the profits from the judicial process. However, in our system justice is not a commodity, and the state may not price an indigent out of as effective an appeal as is available to those who can pay. *Mayer v. City of Chicago*, 30 L. Ed. 2d 372 (1971).

Since the Due Process Clause applies to the threshold right to file a divorce action dissolving the marriage relationship, then due process and equal protection apply to assure the indigent an appeal from an adverse decree dis-

solving the marriage relationship. *Boddie* mandates the first, and *Griffin* mandates the latter.

This line of reasoning is not limited solely to matrimonial cases. The situation of any defendant appealing from an adverse decision in a civil case is clearly parallel to that of a defendant appealing in a criminal case. A defendant in a civil case cannot be deprived of a legal right without a hearing, *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969). If the defendant cannot be deprived of his right to be heard at trial because of indigency, he should not be deprived of an appeal because of indigency. If a defendant loses a civil case, the obligation which will be enforced against him is as much an obligation imposed by the law of the State as is an obligation imposed by the criminal law. The authority of the State lies behind a civil judgment. The power of the state will enforce it. While the potential consequences of a criminal judgment are usually more severe, the loss of property of dissolution of marital and parental relationships through court judgment can have an impact upon a party equal to or even greater than the impact of a criminal judgment. The consequences of a civil judgment are too serious and potentially too severe to be distinguished in a meaningful way from the consequences of an adverse judgment in a criminal case.

Any distinction between defendants in civil and criminal cases becomes completely attenuated when the right of an indigent to a free appeal is extended to those convicted of misdemeanors who are merely fined. Such defendants are punished only in their pocketbooks, and the fines imposed seldom equal in dollar amount typical judgments in civil cases. Yet, this Court has extended the right of free appeal to the indigent convicted of a misdemeanor, because "the size of the defendant's pocketbook bears no more relationship to his guilt or innocence in a nonfelony than in a felony case." *Mayer v. City of Chicago*, 30 L. Ed. 2d 372 (1971).

This is a matrimonial case. As a result of the decision of the Hall County District Court, Huffman's marital relationship with his wife was held to be a nullity and his right to establish his paternal right was denied. Under the *Boddie* reasoning, and because of the close analogy between his situation as a defendant in a civil case and that of a defendant in a criminal case, he should have been extended a free appeal. However, we do not believe that analysis should stop there.

As we have already noted, limiting access to the courts upon the ability to pay fees, is essentially at war with the concept of a government of laws embodied in the Equal Protection Clause. State services as vital to the citizen as those provided by the courts should not be treated as commodities. The ethical and historical roots of our legal system are at one in condemning a rationing of justice in proportion to ability to pay.

In *Harper v. Virginia,* 383 U.S. 663, 666 (1966), this Court held that:

> ". . . a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax. . . ."

In reaching that ultimate conclusion this Court noted that it had long recognized

> "The political franchise of voting [is] a fundamental political right because preservative of all rights." (at page 667.)

Because of the special character of the right to vote in the political process "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." (at page 667). The Court then went on to state, at page 668:

> ". . . Wealth, like race, creed or color, is not germane to one's ability to participate intelligently in

> the electoral process. Lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored. . . . To introduce wealth or payment of a fee as a measure of a voter's qualification is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant. In this context—that is, as a condition of obtaining a ballot—the requirement of fee paying causes an 'invidious' discrimination . . . that runs afoul of the Equal Protection Clause, ..."

The right of access to the courts bears the same relationship to other legal rights as the vote bears to other political rights.

> ". . . The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. *It is one of the highest and most essential privileges of citizenship, . . .*" *Chambers v. Baltimore and Ohio R.R. Co.*, 207 U.S. 142, 148 (1907). [Emphasis supplied.]

Whatever the jurisprudential merits of the view of Justice Holmes that legal rights are valid only insofar as they are enforceable, the practical accuracy of that view cannot be questioned. "Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but are elusive to the grasp." *The Western Maid*, 257 U.S. 419, 433 (1922). If fee payment can be made a condition precedent to access to the courts, then, for those without money, legal rights become ghosts which they will never grasp.

If access to the courts is limited by ability to pay fees, then as a practical matter, legal rights are measured by wealth. Since the State has a practical monopoly on the instruments of force, a person must ultimately look to the State through its courts for the vindication of his rights. Even where settlement is arrived at without suit, it is because the authority of the State can ultimately be marshalled behind a claim. Without the access to the courts, a legal right does not exist.

A right a court will enforce or an obligation it will recognize is significantly different from a right or obligation recognized solely as a matter of business necessity, courtesy, or honor. A sheriff will not sell a person's house if he fails to keep a dinner date. However, if he fails to keep a promise which a court calls a contract, the sheriff may sell his home to satisfy an award of damages. One who tells blue stories in front of a lady is no gentleman. However, one who imputes unchastity to a lady, which a court calls slander, can lose his savings in satisfaction of a judgment.

Ability to pay the fees and costs involved in litigation is as irrelevant to the ultimate merits of a claim as the ability to pay a tax is to the capacity to exercise the franchise. "There [is] no necessary connection between a litigant's assets and the seriousness of his motives in bringing a suit. . . .". *Boddie v. Connecticut*, 401 U. S. 371, 381.

The right of access to the courts is vital. The ability to pay fees and costs is irrelevant to the validity of a claim. Access cannot be denied on the basis of ability to pay. Once the basic right to access is established, the right to appeal, if given to others, cannot be denied because of inability to pay fees for an appeal. *Griffin v. Illinois*, supra.

State trial and appellate courts provide vital public services. The State has a real interest in minimizing the costs of those services. However, a system which minimizes those costs at the expense of the indigent is constitutionally impermissible. The State may price these services, but it may not price them in such a way as to deny the indigent access to them. As this Court said in *Shapiro v. Thompson*, 394 U.S. 618, 632 (1969).

> "Appellants argue further that the challenged classification may be sustained as an attempt to distinguish between new and old residents on the basis of the contribution they have made to the community through the payment of taxes. . . . Appellants' reasoning would logically permit the State to bar new residents from schools, parks, and libraries or

deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services.

"We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification."

The fee which Huffman was unable to pay in this case was a cost security imposed by the State for the benefit of the other party to the litigation. However, we do not believe that this is a distinguishing factor. If the State's interest in protecting its own purse is insufficient to justify denying an appeal to an indigent, then its interest in saving a private party from unnecessary expense is not a sufficient justification for denying an appeal. If saving to the whole community does not justify barring the indigent, then saving to one individual cannot justify such a bar. When the interest of the whole community is not sufficient to bar an appeal by the indigent, the interest of one of its parts should not be.

To hold that the State may not constitutionally bar indigents from access to the courts for its own benefit, but may do so for the benefit of a private party would be to give a constitutional right with one hand and then take it back with the other. A person without funds is barred from the courts whether he has to pay a $75.00 filing fee or a $75.00 cost bond. In either case, justice can be denied because of poverty. Such a denial becomes no more

rational because the interest being protected is a private rather than a public interest.

If the State's reason for requiring cost security is to reduce frivolous or unjust appeals, it must not permit such a requirement to have the reverse effect of preventing meritorious and good faith appeals by the indigent. This would seem to be consistent with the Nebraska Supreme Court pronouncement as to Section 24, Article I, of the Nebraska Constitution as exemplified in *Ferber v. Leise*, 97 Neb. 795, 151 N.W. 307, 308 (1915):

> "It will be seen that this section says 'all civil cases.' It does not say all meritorious cases, but all civil cases. This means that none is to be excluded. If the power was forbidden to be exercised except in those cases where errors are alleged and proven, or when merit must first be shown, then the appellate court might consider the case before it was properly reached, and so not have an opportunity to consider it as it ought to be considered; or it might refuse to consider it at all. In any event, the people, by the adoption of this provision of the Constitution, have said to the Supreme Court, You must not deny 'the right to be heard,' and this right applies to all civil cases."

The minimal bond required by the State of Nebraska offers only limited protection to the other party to an appeal, while it totally bars the very poor from the appellate courts. A bond of $75.00 would hardly reimburse an appellee for the ordinary costs of having a brief printed. The protection it offers an appellee is minimal. However, $75.00 for the very poor is a hurdle on the way to appellate review which they cannot leap. The State affords a minimal protection to all appellees at the price of totally barring a limited class of litigants, the very poor, from its appellate courts. If appellees need protection from the costs of frivolous appeals some fairer method must be found of affording that protection.

III. THE STATE OF NEBRASKA DENIED HUFFMAN DUE PROCESS OF LAW, WHEN THE STATE DISTRICT COURT AFTER BEING INFORMED THAT HUFFMAN WAS INCARCERATED IN THE STATE PENITENTIARY AND THAT HE WAS INDIGENT AND UNABLE TO AFFORD COUNSEL, PROCEEDED TO TRY THE ANNULMENT CASE IN HUFFMAN'S ABSENCE.

In *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971), this Court noted that:

> "Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Early in our jurisprudence, this Court voiced the doctrine that '[w]herever one is assailed in his person or his property, there he may defend,' [citing cases]. The theme that 'due process of law signifies a right to be heard in one's defence,' Hovey v. Elliott, supra, at 417, has continually recurred in the years since Baldwin, Windsor, and Hovey. Although '[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause,' as Mr. Justice Jackson wrote for the Court in Mullane v. Central Hanover Tr. Co., 339 U.S. 306 (1950), 'there can be no doubt that at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' Id., at 313."

Huffman was served with originating process (summons) while incarcerated in the Nebraska Penitentiary (A. 2&3). He had notice of the pendency of the annulment proceedings. Upon receipt of the summons, Huffman timely notified the Hall County District Court that he was incarcerated in the State Penitentiary and that, therefore, he could not be present for the trial of the annulment proceeding unless the

District Court ordered him produced for the trial (A. 14, 23 & 47). He also timely notified the court that he was unable to afford counsel (A. 14, 23, 47). The Hall County District Court refused to take any action on Huffman's request to be present for the trial of the annulment proceeding. Notice of the court's action setting the date for trial was served upon Huffman at the State Penitentiary four days prior to the hearing. That same day Huffman again demanded of the trial court the right to be present (A. 47), but the case was tried in his absence.

In an adjudicatory proceeding a party's right to be heard encompasses "an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). The State of Nebraska denied Huffman this right of participation, when the trial court failed to order Huffman's presence in court at the time of the annulment proceeding.

Of what worth to Huffman was a technical opportunity to be heard? The trial was held in Grand Island. He was in Lincoln, 100 miles away, surrounded by iron bars, armed guards, and concrete walls intended to keep him there. While the State of Nebraska holds its courts open to suits against those incarcerated in its penitentiary, it cannot ignore the fact of incarceration and its effect on the prisoner's right to participate in civil proceedings. Some action must be taken to assure that the incarcerated prisoner has an opportunity to present his side of the case.

In other contexts this Court has noted that where the ordinary forms of procedure calculated to give notice and afford an opportunity to be heard are to the State's knowledge mere form, the State must go beyond the usual to insure an effective opportunity to be heard. In *Covey v. Town of Somers*, 351 U.S. 141, 146, 147 (1956), where the notice of a judicial foreclosure of a tax lien was given to a person known by a town to be incompetent, this Court held that:

> "Notice to a person known to be an incompetent who is without the protection of a guardian does not measure up to this requirement. Assuming the truth of the uncontradicted assertions, that the taxpayer Nora Brainard was wholly unable to understand the nature of the proceedings against her property (from which it must be inferred that she was unable to avail herself of the statutory procedure for redemption or answer), and that the town authorities knew her to be an unprotected incompetent, we must hold that compliance with the statute would not afford notice to the incompetent and that a taking under such circumstances would be without due process of law."

Again in *Boddie v. Connecticut,* 401 U.S. 371, 379, this Court observed that ". . . the right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals."

There is no countervailing State interest of sufficient importance to justify the trial of factual issues in a case without affording an unrepresented indigent prisoner an opportunity to be heard in his own defense. Transporting a prisoner to the place of trial and keeping him there while the trial is in progress would involve expense of the State. The cost to the State involved in affording due process, does not justify its denial. *Boddie v. Connecticut,* supra. Transportation of prisoners and their temporary quartering outside the State Penitentiary present dangers of escape. However, prisoners are often transported and quartered away from a prison. Removal for trial of pending criminal charges is a standard example.

If the State deemed the cost factor significant, it might arrange for subsequent recoupment of expenses. Many states make small payments to prisoners for labor in prison industries, costs could be charged against these wages. Perhaps reimbursement could be required after release and return to employment. Problems of transporting the pris-

oner might be obviated by appointing counsel for him. Perhaps then he would not need to be personally present. But whatever steps the State takes, it must at a minimum assure the indigent prisoner the opportunity in person or by counsel to hear the evidence against him, challenge it by cross-examination and by presentation of his own case.

The Nebraska Penal Complex permits process servers (County Sheriffs in this case) to enter the prison confines, so that service can be made upon a prisoner. The Penitentiary also permits prisoners to be transported to the place of trial if ordered or requested by a court. (See letter to counsel dated January 31, 1971 from Victor G. Walker, Director of Corrections of the Nebraska Penal Complex, Appendix C of this brief.)

The trial court was so advised by Huffman (A. 11, 47). Notwithstanding all this, the trial court ignored the timely the most cursory examination of the Transcript (A. 1 to 55 incl., 67 to 74 incl. and 76) and the Bill of Exceptions (A. 57 to 64 incl.) shows the total deprivation of even the most rudimentary protection of Huffman's rights. The entire trial record is only five pages long. In thirty-four questions and three exhibits, Huffman's marriage to Faye Boersen was declared a nullity and his right to establish his paternity of the child named Donald Lee Boersen was denied.

In other (Sixth Amendment, right to a speedy trial and to the right of confrontation of witnesses) but analogous contexts, this Court has held that a State has a duty to seek the return of prisoners from other jurisdictions (Federal prisons) to assure confrontation and a speedy trial. *Barber v. Page*, 370 U.S. 719 (1968); *Smith v. Hooey*, 393 U.S. 374, 383 (1968).

> "Upon the petitioner's demand, Texas had a constitutional duty to make a diligent, good-faith effort to bring him before the Harris County court for trial."

Implicit in these cases is the imposition of a duty on a state to produce prisoners from its own prisons before its own courts in these circumstances. The right to be heard in a civil case is entitled to no lesser protection than the Sixth Amendment rights involved in *Smith v. Hooey*, and *Barber v. Page*.

CONCLUSION

For the reasons stated, it is respectfully submitted that the order of the Nebraska Supreme Court dismissing Huffman's appeal should be reversed.

Respectfully submitted,

LEO EISENSTATT
707 City National Bank Building
Omaha, Nebraska 68102
Counsel for Petitioner

Of Counsel:
J. PATRICK GREEN

February 3, 1972.

Appreciative acknowledgment is made of the valuable assistance of Steven M. Luttbeg, a graduate of the Creighton University College of Law, who could not sign because he was not yet a member of the Bar.

APPENDIX A

APPLICABLE NEBRASKA SUPREME COURT RULES

I

PRACTICE IN SUPREME COURT

1. Procedure on Appeal.

a. Perfecting of Appeal. Every appeal shall be deemed perfected on filing of notice of appeal in the office of the clerk of the district court, accompanied by a docket fee of $20, as required by section 25-1912, R. R. S. 1943.

b. Docketing of Cause. Upon forwarding such docket-fee and such notice of appeal to the clerk of this court, the clerk of the district court shall accompany the same with a certificate setting forth the names of all of the parties to the cause in the district court and their relation to the case as they appeared in that court. The clerk of the court shall thereupon docket the case designating the party or parties first having filed notice of appeal in the court below as appellant or appellants, and all other parties as appellees, *and any attempt to appeal thereafter made by any party thereto shall be filed therein and not separately docketed.*

* * * * *

f. Dismissal of Appeal. An appeal shall be dismissed on motion of the appellant or appellants, only if a copy of such motion shall first have been served upon the attorney or attorneys of record for all other parties at least ten days before said motion is acted upon by the court. If, at or before that time, any party thereto objects to said dismissal this court may disallow it if, in its judgment, any ground or grounds set forth in such objections justifies doing so. Any party having a right of cross-appeal at the time the motion to dismiss is filed may, within the 10-day period provided for in this rule, file a notice of his intention to cross-appeal. Upon the filing of such notice

the court shall deny the motion to dismiss and shall fix a brief day for such cross-appellant. The cause shall then proceed as if the appeal had originally been perfected by the appellee who has cross-appealed. An appeal, however, may be dismissed at any time upon stipulation of all parties of record in said cause.

3. Costs and Security for Costs.

a. Docketing Fee. Docket fees shall not be required in cases arising under the Workmen's Compensation or Unemployment Compensation laws. Advance payment of docket fees shall not be required in habeas corpus cases, post conviction cases, disciplinary proceedings, or in criminal cases where an affidavit of poverty has been filed under the provisions of section 29-2306, R. R. S., 1943. In all other cases, payment of docket fees in advance shall be made as required by section 33-103, R. R. S. 1943.

b. Security for Costs. An appeal will be dismissed upon motion and notice for failure to comply with section 25-1914, R. R. S. 1943, unless additional time for compliance be granted for good cause shown.

4. Transcripts.

a. Contents. The transcript shall contain: (1) The pleadings upon which the case was tried; (2) the judgment, decree or final order sought to be reversed, vacated or modified; (3) the instructions given or refused by the trial court, if the appellant intends to assign error in the giving or refusal thereof; (4) a copy of the supersedeas bond, if any, given in the district court, or, if none has been given, a recital of the fact that a bond for costs was given and approved in the district court, or a deposit made as required by section 25-1914, R. R. S. 1943; and (5) such other parts of the record as the party appealing may desire to include therein.

b. Form. The transcript shall be typed or mechanically reproduced by a method which results in permanent copy, and shall be on only one side of the paper. If typed,

the typing shall not be smaller than pica and shall be prepared on white bond paper, 8½ x 14 inches, of not less than 16 pound substance. If mechanically reproduced, it shall be on white paper, 8½ x 14 inches, of substantial substance. Each page of the transcript shall be sharply and clearly legible. The transcript shall be securely bound at the top and each page thereof shall be consecutively numbered, such number to be placed at the bottom of the page. An index shall be supplied referring to the initial page of each item contained in the transcript. Such index shall constitute the first page of the transcript.

c. Supplemental Transcript. After the original transcript is filed in the clerk's office, any party may without leave of court file a supplemental transcript containing any matters omitted from the original transcript. After filing, no change in the original or supplemental transcript shall be made or papers added to or withdrawn therefrom without leave of court. All supplemental transcripts must be filed prior to the day the cause is submitted to the court, unless leave of court be first obtianed.

7. Bill of Exceptions.

a. Index. The bill of exceptions shall have an index starting on the first page thereof. The index shall show (1) each witness in the order called and the initial page of his or her direct, cross, and further examination, (2) all depositions and exhibits and the initial page where identified, offered, ruled on, and found; (3) stipulations, motions to dismiss or to instruct a verdict, together with the rulings thereon, and page where found, and (4) the certificate of the court reporter, which should always be placed in the first volume.

* * * * *

c. How Ordered. The party appealing may order a bill of exceptions by filing in the office of the clerk of the dis-

trict court a praecipe therefor within the time allowed for filing a notice of appeal. Unless otherwise specified therein, a praecipe requires that all of the evidence offered at the trial and all of the evidence offered at any hearing on any matter and the rulings thereon be included in the bill of exceptions. Appellant may in the alternative specify in the praecipe that less than all of such evidence be included in the bill of exceptions; however, the bill of exceptions shall be so prepared only if the written consent of all other parties be endorsed on or attached to such praecipe. The clerk of the district court shall forthwith deliver a copy of the praecipe, with attachments and endorsements thereon, to the court reporter and a copy to the Clerk of the Supreme Court.

d. Preparation and Delivery by Reporter.

1. Within two months after the filing of appellants's praecipe, the court reporter shall deliver to the clerk of the district court a bill of exceptions as requested in the praecipe and prepared in accordance with rules 7a and 7b. The bill of exceptions shall be certified by the court reporter as being correct and complete in accordance with the praecipe.

2. If the court reporter is unable to prepare and certify a bill of exceptions, a bill of exceptions shall be prepared under the direction and supervision of the trial judge and shall be certified by the judge and delivered to the clerk of the district court.

3. Upon receipt of the bill of exceptions, the clerk of the district court shall forthwith file it and notify all parties or their attorneys of record and the Clerk of the Supreme Court of the date of such filing. When filed with the clerk of the district court, such bill of exceptions becomes the official bill of exceptions in the case.

e. Amendments. The parties in the case may amend the bill of exceptions by written agreement to be attached to

the bill of exceptions *at any time prior to the time the case is submitted to the Supreme Court.* Proposed amendments not agreed to by all the parties to the case shall be heard and decided by the district court after such notice as the court shall direct. The order of the district court thereon shall be attached to the bill of exceptions prior to the time such case is submitted to the Supreme Court. The clerk of the district court shall send the bill of exceptions to the Supreme Court when directed to do so by the Clerk of the Supreme Court. After the bill of exceptions is filed with the clerk of the district court it may be withdrawn by any party or his attorney of record subject to the rules and orders of the district court. Hearings with respect to proposed amendments to a bill of exceptions shall be had before the judge who tried the cause. Such hearings may be held at chambers anywhere in the state. If the judge shall have ceased to hold office, or shall be prevented by disability from holding the hearing or be absent from the state, such proposed amendments shall be heard by the clerk of the district court for the county where the case was filed.

f. Extension of time for Preparation. Where a bill of exceptions has been ordered according to law by the timely filing of a praecipe, and the court reporter fails to prepare and file the bill of exceptions with the clerk of the district court within the time fixed by Rule 7d, the Supreme Court may, on the motion of any party accompanied by a proper showing, grant additional time for the preparation and filing of the bill of exceptions under such conditions as the court may require. Applications for such an extension of time shall be made within one month after the expiration of the time allowed by Rule 7d or within one month after the expiration of a previous extension of time, or within such additional time as the Supreme Court in its discretion upon proper showing may allow.

* * * * *

h. Criminal Cases. In all criminal cases where a defendant shall feel himself aggrieved by any opinion or decision of the district court, he may order a bill of exceptions, and the ordering, preparing, signing, filing, correcting, and

amending thereof shall be governed by the rules established in such matters in civil cases. In criminal cases where the sentence is capital punishment, the notice required by section 29-2306.02 shall constitute an order for the bill of exceptions, which order shall be filled by the court reporter within two months after receipt of such notice.

i. Case Stated. The parties may by agreement state the case to be presented to this court on appeal. The case stated shall briefly recite the facts out of which the questions of law arise and also any substantial conflict in the evidence as to any fact involved. It shall separately identify and quote the rulings of the court complained of with so much of the record as will fully show the law question involved in such ruling and the exceptions and contentions of the parties thereon. The case stated shall constitute the bill of exceptions. It must be allowed and certified by the judge who tried the case, filed with the clerk of the district court, made a part of the record of the district court as in other cases, and included therein where the transcript of the record is filed in this court.

9. Briefs, Printing and Taxation.

a. How Printed. All briefs shall be printed unless otherwise allowed by the court on good cause shown. Briefs shall be printed on unglazed white book paper on pages 6½ inches wide and 9½ inches long, trimmed size. The printed matter shall be 4 inches wide and 7 inches long. The type used may be 12 point but not smaller than 10 point, with lines leaded 2 points except in quotations which may be leaded 1 point and exhibits may be prepared in smaller sizes when necessary. Italic type or underscoring may be used on citations.

b. Form of Cover. The cover and heading of each brief shall show the number and title of the case, the county from which the case was brought, the name of the trial judge, the names of counsel filing the brief, and shall also indicate in whose behalf the brief is filed.

c. Length of Briefs. The total content of all briefs filed on behalf of any party to a cause pending in this court on its original submission shall not exceed 100 pages, unless otherwise ordered by the court.

d. Cost of Printing. When the parties or their attorneys furnish their printed briefs in conformity to the rules of this court it shall be the duty of the clerk to tax a fee therefor against the unsuccessful party to be collected and paid to the successful party as other costs. Costs shall not be taxed for the printing of a reply brief except such part as is in answer to a cross-appeal, nor for printing briefs unless printed, served, and filed in conformity with the rules of this court. The amount taxed shall not be in excess of $2.60 per page but in no event to exceed the actual cost of printing. Proof of the actual cost of printing shall be submitted to the clerk with the filing of the brief. The total number of pages that may be taxed as costs shall in no event exceed 75.

e. Costs, When Taxable. Costs for briefs shall be taxed when served and filed within the time originally fixed as brief day, or, if an extension of brief day has been procured, within the time fixed by such extension.

10. Failure to Comply. The clerk shall refuse to file any brief not prepared in accordance with these rules and shall immediately notify counsel of the objections thereto.

11. Briefs, Filing and Service.

a. Time of Service.

(1) Civil Cases. In all civil cases, except advanced cases, appellant must file his brief within two months from the date the appeal is docketed in this court whenever there is no bill of exceptions ordered otherwise within one month from the expiration of the time allowed by our rules for preparing and filing the bill of exceptions with the clerk of the district court, or, if an extension of time is granted

by this court for that purpose, within one month from the expiration thereof, and shall file proof of service thereof on appellee showing that such service was made on or before brief day.

Within one month after the appellant has served and filed his brief, the appellee shall serve his brief on the appellant and file the same, together with proof of service thereof, with the clerk of this court.

Within ten days after the appellee has served and filed his brief, the appellant may serve and file a reply brief.

(2) Criminal Cases. In criminal cases the appellant must file his brief within two months from the date the appeal is docketed in this court whenever there is no bill of exceptions ordered otherwise within one month from the expiration of the time allowed by our rules for preparing and filing the bill of exceptions with the clerk of the district court or, if an extension of time is granted by this court for that purpose, within one month from the expiration thereof, and shall file proof of service thereof on the Attorney General, showing that such service was made on or before brief day. The state shall serve and file its brief within one month after the brief of the appellant has been served and filed. Within ten days after the state has served and filed its brief, the appellant may serve and file a reply brief.

(3) Advanced Cases. In advanced civil cases, brief day for both appellant and appellee shall be the same as in other cases unless a definite time be fixed by the court in its order of advancement.

(4) Original Actions. Brief day in original actions shall be fixed by order of court.

b. Method of Service. Service may be made either upon the party or an attorney of record. It may be made either by (1) personal service or (2) certified or registered mail. Proof of service may be shown by affidavit of the person making service or by receipt of the party served.

c. Filing. Fifteen copies of each brief so prepared by either party, together with proof of service of the same on opposite party, shall be filed in the clerk's office.

d. Amicus Curiae. Briefs of Amicus Curiae may be filed without leave of court in any case before it is placed upon the Call. After the case is on the Call leave of court must be obtained. In all cases such briefs must be served upon all attorneys of record and proof of service thereof submitted before the same may be filed.

e. On Rehearing. Where a rehearing has been granted or reargument of the case ordered, either party may file additional briefs. Fifteen copies of each brief so prepared and served, together with proof of service, shall be filed in the clerk's office not less than one week before the case is submitted. Unless the filing of such briefs shall have been ordered by the court, they shall not be taxable as costs.

12. Motions, Except Motions for Rehearing.

a. Form of Motion. All motions shall be in writing.

b. Notice of Hearing. Motions, other than motions for rehearing, shall, except under special circumstances, be noticed for hearing at 9:00 o'clock a.m. on the first day of a regular session. A motion and notice of hearing shall be served on the adverse party, or his attorney of record, at least three days before the hearing. The motion, notice and proof of service shall be filed with the clerk at least two days prior to the hearing.

c. Form of Notice. The notice herein provided for shall conform to the provisions of section 25-910, R.R.S. 1943, and shall be accompanied by a copy of the motion with copies of all affidavits which are to be used upon the hearing.

d. Service of Motion and Notice. The motion and notice shall be served in the same manner as provided by Rule 11b for the service of briefs.

e. Extension of Brief Day. An order extending brief day for 30 days may be requested by motion or stipulation. A further extension will not be granted except upon a showing of good cause.

f. Oral Argument Not Allowed. No oral argument shall be allowed in the following motions unless specifically ordered by the court:

(1) Motions to extend time for preparation of bill of exceptions.

(2) Motions to extend brief day.

(3) Motions to advance cases for hearing.

(4) Motions to continue cases on Proposed Call.

(5) Motions to consolidate cases for briefing and argument.

(6) Motions to recall mandate.

22. Mandates.

a. Issuance. No mandate will issue in any case during the time allowed for the filing of a motion for rehearing, or pending the consideration thereof, unless ordered by the court or stipulated by the parties.

b. Stay Pending Appeal to United States Supreme Court. Parties desiring to prosecute proceedings to the Supreme Court of the United States, either by appeal or certiorari, may make application within twenty days from the date of the filing of the opinion for an order staying the issuance of the mandate. Such application must be accompanied by a sufficient written showing to indicate that a federal question is involved. If the application is granted, the court may require the giving of bond as a condition therefor.

c. *Motion to Recall Mandate.* A motion to recall mandate must be noticed and served as provided in Rule 12. Such motion must be supported by a showing that no action has been taken upon the mandate by the trial court. Objections may be filed on or before the date of submission of the motion.

APPENDIX B

Although not in the Record, by agreement of counsel the following additional facts with respect to this case have been stipulated:

(a) Huffman prepared a typewritten brief pro se which was delivered to the Gant Publishing Co. in Lincoln, Nebraska to be printed.

(b) Huffman and the said Gant Publishing Co. agreed in advance that the brief would cost the sum of $88.58 to be paid from Petitioner's funds in his account at the Nebraska Penal Complex. This sum was paid from the Inmates Fund to the Gant Publishing Co. on June 14, 1971.

(c) On June 16, 1971 Mr. Chester Paul, President of the Gant Publishing Co. personally attempted to deliver the printed copies of Huffman's brief to the Clerk of the Nebraska Supreme Court. The Clerk refused same, saying that the case had been dismissed, at which time the printed briefs were delivered to Huffman by Mr. Paul.

(d) At all times pertinent hereto, funds in Huffman's account at the Nebraska Penal Complex, after deducting the $20.00 docket fee and the $88.58 brief printing cost, did not exceed the sum of $5.00 and Huffman had no other funds or resources available to him, neither directly nor indirectly.

APPENDIX C

State of Nebraska
Nebraska Penal and Correctional Complex
Box 81248
Lincoln, Nebraska 68501

January 31, 1972

Mr. Leo Eisenstatt
Attorney at Law
Suite 707
City National Bank Building
Omaha, Nebraska 68102

Re: Harold Huffman
Our No. 27940

Dear Mr. Eisenstatt:

This is in response to your recent correspondence regarding the feasibility of having Harold Huffman personally available for court hearings.

Please be informed that a court order is necessary for the authorities at the Nebraska Penal and Correctional Complex to allow Huffman to appear in any municipal, county, district, or other state court within the boundaries of the State of Nebraska. This order should be directed to Charles L. Wolff, Jr., Warden, Nebraska Penal and Correctional Complex, P. O. Box 81248, Lincoln, Nebraska, 68501.

I sincerely hope that this information satisfies your inquiry. However, should you have any additional specific questions, please do not hesitate to contact me.

Sincerely,

/s/ Victor G. Walker
Director of Corrections

VGW/al

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of February, 1972, one copy of the Brief for the Petitioner was mailed, postage prepaid, to Vincent A. Dowding, Esq., P. O. Box 1192, Grand Island, Nebraska 68801, counsel for Respondent. I further certify that all parties required to be served have been served.

LEO EISENSTATT
707 City National Bank Bldg.
Omaha, Nebraska 68102
Counsel for Petitioner.

SUPREME COURT, U. S.
FILED
APR 4 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-5097

HAROLD EUGENE HUFFMAN,

Petitioner,

v.

FAYE I. BOERSEN,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

RESPONDENT'S BRIEF AND APPENDIX

VINCENT L. DOWDING
216 North Cedar Street
Grand Island, Nebraska
Attorney for Respondent

March 23, 1972

Washington, D. C. · THIEL PRESS · 202 · 393-0625

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

RESPONDENT'S BRIEF

OPINION BELOW

Petitioner's statement of the Opinion Below is accepted.

JURISDICTION

Petitioner's statement of the Jurisdiction is accepted.

QUESTION PRESENTED

Is Nebraska Revised Statute Section 25-1914 (1964 Reissue) which requires a bond or cash in the amount of $75.00 to be filed in order to appeal from the trial court to the Nebraska Supreme Court unconstitutional when applied to Harold Huffman who is indigent and unable to post the bond or cash?

STATUTES INVOLVED

Petitioner's statement of the Statutes Involved is accepted.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is accepted.

SUMMARY OF THE ARGUMENT

1. Harold Huffman appealed a decision, granting an annulment to Faye Boersen, from the District Court of Hall County, Nebraska, to the Nebraska Supreme Court. He met all cost and fee requirements and was able to pay for a printed brief. The only financial requirement he could not meet was the $75.00 cash or bond requirement in Nebraska Revised Statute Section 25-1914 (1964 Reissue). This Statute guarantees that the Appellant will pay all court costs assessed against him on appeal up to $75.00. Court costs assessed against the loser on appeal include the winning party's Brief printing costs. This Statute protects the financial interests of the private litigant and not the state. *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1948) holds that states have the right to establish reasonable financial and cost requirements in civil litigation. In *Cohen* a bond requirement for plaintiffs was upheld in a stockholders derivative action. *Lindsey v. Normet*, 40 U.S.L. Week 4184 (No. 70-5045, February 23, 1972) indicated that an Oregon standard appeal bond requirement was valid on

its face and *Lindsey* is a firm foundation for the validity of the Nebraska cost bond statute under attack herein. If the Nebraska appeal bond cost requirement is held to be unconstitutional, without an alternate remedy, Nebraska is forced to abandon its policy of providing financial protection for the winning civil litigant on appeal or its policy of taxing the court costs to the loser on appeal. These policies must be abandoned or Nebraska will be required to pay the winner's costs out of state funds, if the loser cannot pay because of his poverty.

2. *Boddie v. Connecticut*, 401 U.S. 371 (1971) is distinguishable from the case at bar. The financial interest of a private litigant, as opposed to the state, is involved in this case. In *Boddie*, the state suffered the financial loss when the filing fee was waived. In this case Faye Boersen loses her $75.00 guarantee for payment of her costs if she wins in the Nebraska Supreme Court. Harold Huffman's right to have an appellate tribunal determine the validity of a marriage – to a woman that does not want the marriage – does not approach the "fundamental" status required in *Boddie*. On this issue as to the right of Faye Boersen to obtain an annulment, the only issue validly decided by the Hall County District Court, Huffman's appeal to the Nebraska Supreme Court is without merit and frivolous. Nebraska law is clear that a marriage is void when one of the parties to the marriage contract is already married. See *Scott v. Scott*, 153 Neb. 906, 46 N.W. 2d. 627 (1951). That is the fact situation in this case. Faye Boersen was married to Richard Boersen when she married Huffman. A meritless appeal should not be used to extend *Boddie* to the appellate level of civil litigation.

3. The Equal Protection clause as applied in *Griffin v. Illinois*, 351 U.S. 12 (1956) should not be extended to this civil appellate litigation between two private litigants. If Nebraska must provide economic equality for all civil litigants, the financial ramifications could be staggering. Financial equality in civil litigation would call for payments of all filing

fees, process fees and court costs plus attorney fees, discovery expenses and bond requirements. If the indigent is given a free pass to civil litigation procedures, then perhaps the Equal Protection clause demands that people who can afford such passage be given this free access to all courts and litigation procedures as well. Consideration would have to be given to providing free litigation procedures for everyone or giving financial assistance to everyone based upon the level of financial ability of each litigant. Faye Boersen contends that the Equal Protection clause does not require the state to waive the cash or bond requirement in this case.

4. If the Court does invalidate the cost bond requirement in this case, Faye Boersen requests that she be protected financially by alternative methods. This Court could allow her to file a typewritten brief in the Nebraska Supreme Court thus relieving her of the brief printing expense. Her only other cost on appeal is a $5.00 filing fee. As an alternative, this Court could allow Huffman to pay the costs taxed against him on appeal by an installment method secured by an assignment of his prison wages. These two alternative methods would be fair to both parties.

ARGUMENT

I. THE STATE OF NEBRASKA HAS THE RIGHT TO ESTABLISH REASONABLE REQUIREMENTS TO PROTECT WINNING CIVIL LITIGANTS ON APPEAL AGAINST COURT COSTS.

The particular Statute under attack here and the Statute that Harold Huffman was unable to comply with is Nebraska Revised Statute Section 25-1914 (1964 Reissue) which reads as follows:

> "On appeal in any case taken from the district court to the Supreme Court the appellant or appellants shall, within one month next after the rendition of the judgment or decree or the making of the final order, sought to be reversed, vacated or modified,

> or within one month from the overruling of a motion for a new trial in said cause, file in the district court a bond or undertaking in the sum of seventy-five dollars to be approved by the clerk of the district court, conditioned that the appellant shall pay all costs adjudged against him in the Supreme Court; or in lieu thereof, shall make a cash deposit with said clerk of at least seventy-five dollars for the same purpose; *Provided*, that if a supersedeas bond is executed no bond for costs shall be required. The giving of either form of bond or the making of such deposit shall be certified to by the clerk of the district court in the transcript for the Supreme Court. The appeal may be dismissed on motion and notice in the Supreme Court if no bond has been given and certified in the transcript, or within such additional time as may be fixed by the Supreme Court for good cause shown."

The plain purpose of this Statute is to guarantee that the Appellant in the Nebraska Supreme Court shall pay the court costs assessed against him on appeal if he loses. These court costs include the brief printing expenses of the Appellee (Supreme Court Rule 9d, Appendix A, Page 7a of Petitioner's Brief). Definite expenses are involved in the brief printing because Rule 9a of the Nebraska Supreme Court says that all briefs shall be printed unless otherwise allowed by the Court on good cause shown (Supreme Court Rule 9a, Appendix A, Page 7a of Petitioner's Brief). Harold Huffman did not attempt to have the printing requirement waived in the Nebraska Supreme Court and his brief printing expenses were $88.58 (Appendix B of Petitioner's Brief).

The Nebraska Supreme Court, in *School District v. Travers*, 43 Neb. 524, 61 N.W. 720 (1895), established the right of the State of Nebraska to set up some requirements for appeal when it said:

> "While the legislature is powerless to take away the right guaranteed by the Constitution to a party to

> have his cause reviewed in the Court of last resort by appeal or error, yet it is not prohibited from prescribing reasonable rules and regulations for such review, such as requiring the Appellant to give a bond." 43 Neb. 524, at 527 and 528.

The appeal bond statute under attack here simply protects the winning appellee litigant against absorbing his own court costs up to $75.00. The appeal bond requirement thus serves a valid state policy of protecting private litigants who win on appeal from financial loss on the court costs. The policy behind the Statute also must be to attempt to limit unnecessary appellate litigation. To allow an appeal with no bond requirement would serve only to foment unnecessary appellate litigation. Civil litigants appealing with their own funds have to weight their probability of success on appeal and the value to them of a victory against the possible costs of appeal. An indigent with all fee requirements waived does not have to make any such decision and has nothing to lose by appealing. This raises the very real danger of crowded court dockets. In the case of Harold Huffman this danger is very apparent. He has already filed numerous cases in the federal courts in forma pauperis (A. 24-28).

Mr. Justice Black in a vigorous dissent on *Boddie v. Connecticut*, 401 U.S. 371 (1971) relied upon *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1948) as authority for the proposition that states have the right to establish reasonable financial and cost requirements in civil litigation. In *Cohen* the Court upheld a requirement for the Plaintiff to post a bond for security for costs before proceeding in a stockholders derivative action. The Court said: "A state may set the terms on which it will permit litigation in its courts" (337 U.S. 541, 552). And the Court went on to say: ". . . (I)t is within the power of the state to close its courts to this type of litigation if the condition of reasonable security is not met" (337 U.S. 541, 552). The purpose behind the statutory requirements in

Cohen was to discourage frivolous and unnecessary stockholders derivative actions. The *Cohen* case stands as direct authority for the validity of the appeal bond statute involved in the case at bar.

If the Court invalidates the appeal bond requirement herein without an alternative remedy, it is forcing the abandonment of the state's policy of protection of civil litigants or it is requiring the state to pay the winner out of state funds, or it is forcing the state to abandon the policy of taxing the court costs against the loser. See *The Supreme Court, 1970 Term,* 85 Harv. L. Rev. at 112 (1971). Nebraska should have the right to establish these policies in setting up and maintaining its judicial system.

II. THE REASONABLE APPEAL COST BOND REQUIREMENT HEREIN DOES NOT DENY HAROLD HUFFMAN DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The case heavily relied on by Harold Huffman in his Brief is *Boddie v. Connecticut,* 401 U.S. 371 (1971). In the *Boddie* case, the state's requirement of a filing fee in divorce actions was held to be void when applied to indigents. In *Boddie,* the state itself suffered the financial loss when the fee was waived while the private litigants were not financially affected except that the Plaintiff's filing fee requirements were waived. The Court was very careful to limit *Boddie* to its own facts: "We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the due process clause of the 14th Amendment so that its exercise may not be placed beyond the reach of any individual" (401 U. S. 371, 382). Faye Boersen strongly urges that the *Boddie* case should not be extended to appellate litigation between private parties when the requirement set up by the State of Nebraska only affects the financial interest of the private litigants. It is easier for the state to bear the loss.

The Court in *Boddie* held that the Plaintiff had a fundamental right to seek judicial dissolution of a marriage when without such a hearing, she was bound to a marriage that was not satisfactory. Access to the trial court in the *Boddie* case may be entirely different than access to the appellate court in this case as applied to Harold Huffman. Does Harold Huffman have a fundamental right to litigate the validity of his marriage to Faye Boersen on appeal? What Harold Huffman seeks to maintain in this action is an alleged marriage to a woman that won't live with him even after he finishes his term in the Nebraska Penal Complex. This would not appear to be the type of "fundamental" right that the Court should seek to protect by guaranteeing an appellate hearing.

In *State ex rel Caulk v. Nichols*, 281 A. 2d. 24 (Del. 1971), the Delaware Court had occasion to rule on the constitutionality of a bond requirement insuring the recovery of a debt on appeal from Justice of the Peace Court. The Court indicated that they were not being asked to waive a right of the State to recover its costs but they were being asked to waive a right of a litigant to being guaranteed payment of a debt if he's obligated to relitigate the case in the Superior Court. Making this distinction, the Delaware Court upheld the bond requirement.

Another case which refused to extend *Boddie* to civil litigation was *Chidsey v. Guerin*, 443 F. 2d. 584 (6th Cir. – 1971). In *Chidsey*, the Court affirmed the requirement of a bond on appeal from a reparation order issued by the Secretary of Agriculture. To obtain judicial review of the reparation order in the District Court, the licensee had to post a bond for double the amount of the reparation award. The question was whether or not the bond requirement violated the due process clause when applied to the licensee who lacked assets to post the bond. The Court upheld the bond requirement and said that the penalty for failure to post bond would at the most be a two or three year suspension of the licensee's privilege to be a broker. The

Court found that this interest did not qualify as "fundamental" under the *Boddie* test and held that unlike *Boddie*, access to the courts was not the only remedy.

III. THE REASONABLE APPEAL BOND REQUIREMENT IN THIS CASE DOES NOT DENY PETITIONER EQUAL PROTECTION OF THE LAWS UNDER THE 14TH AMENDMENT.

Huffman also relies on the Equal Protection clause of the Fourteenth Amendment and its application in *Griffin v. Illinois*, 351 U.S. 12 (1956) to support his argument. *Griffin* applies directly to criminal appeals and has led to varied application in the criminal law and habeas corpus areas. Huffman seeks to extend the Equal Protection clause in *Griffin* to civil appeals. Faye Boersen contends that such an extension is not warranted in this case.

What Huffman seeks here is to be placed on an equal economic basis with people that can pay the cost of civil litigation. The State of Nebraska should not be required to do this.

Justice Frankfurter concurring in *Griffin v. Illinois*, 351 U.S. 12 (1956) said: "Of course a state need not equalize economic conditions" (351 U.S. 12, 23). Mr. Justice Minton and Burton, dissenting in the same case said: "Illinois is not bound to make the defendants economically equal before its bar of justice" (351 U.S. 12, 28), and said further: "The Constitution requires the equal protection of the law, but it does not require the states to provide equal financial means for all defendants to avail themselves of such laws" (351 U.S. 12, 29). Mr. Justice Harlan dissenting in *Douglas v. California*, 372 U.S. 353 (1963), stated:

> "The equal protection clause does not impose on the states 'an affirmative duty to lift the handicaps flowing from differences in economic conditions' (Dissenting opinion in *Griffin v. Illinois*). To so construe it would be to read into the Constitution a philosophy of leveling that would be foreign to many of our basic concepts of the proper relations

> between government and society. The state may have a moral obligation to eliminate the evils of poverty but is not required by the equal protection clause to give to some whatever others can afford." (372 U.S. 353, 362).

If the State of Nebraska must place Huffman on an equal financial basis with people who can pay for civil litigation, then the Court should consider the ramifications that flow from such a ruling. Generally, the decisions in this area discuss the difference between the "rich" and the "poor." Actually, many of our citizens lie somewhere in between these two extremes depending on the economic scale that is established to fit the definitions. If the Court gives the truly poor people, such as Huffman, a free pass in civil litigation, then to be truly equal to all citizens, it must consider giving everyone a free pass or giving financial assistance or subsidies based upon the economic situation of each litigant. In order to treat everyone truly equal in this area these ideas must be seriously considered. It is not true equality to give one litigant free access to all levels of our courts and deny it to someone else who can pay with or without financial burden or hardship.

If this nominal security requirement is held to be invalid, it opens the door to all civil litigation expenses including the appointment of counsel. It also poses the question that perhaps all state fees for services are invalid when applied to indigents. This case could pose a very real question as to whether or not all state fees on the poor man may be in jeopardy, including tuition to universities and schools, roads, licenses and any other services in areas in which there is significant state activity. The financial impact of this case on the states could be staggering.

The Court in *Lindsey v. Normet*, 40 U.S.L. Week 4184 (No. 70-5045, February 23, 1972) gave a clear indication that *Griffin* and *Boddie* do not extend to reasonable appeal bond requirements in civil litigation. The Court in *Lindsey* had occasion to discuss a standard appellate bond require-

ment which protected the litigant who won in the trial court. While holding that the double appellate bond requirement violated the Equal Protection Clause the Court indicated that the standard appeal bond requirement may well be valid. In *Lindsey*, the Court discussed Oregon Revised Statute Section 19.040 which required an appellant to post an undertaking covering all damages, costs and disbursements which may be awarded against him on appeal. This was the standard appeal bond requirement and not the double bond requirement. The Court indicated that this standard bond requirement would raise no serious constitutional objection at least on its face. It went on to say that:

> "While a state may properly take steps to insure that an appellant posts adequate security before an appeal to preserve the property at issue, to guard a damage award already made, or to insure a landlord against loss of rent if the tenant remains in possession, the double bond requirement here does not effectuate these purposes since it is unrelated to actual rent accrued or to specific damage sustained by the landlord" (40 U.S.L. Week 4184, 4191 (1972).

The Court thus indicated that a reasonable appeal bond requirement in this case which insures only the payment of the court costs is probably valid on its face. The issue which the Court must now decide is whether or not the similar Nebraska Statute covering only court costs is unconstitutional and thereby invalid as applied to an indigent who is unable to meet the requirement. Faye Boersen contends that the Equal Protection Clause does not extend to this type of economic equality.

IV. IF THE COURT WISHES TO EXTEND THE *BODDIE* PRINCIPAL TO CIVIL LITIGATION BETWEEN PRIVATE PARTIES ON APPEAL, THIS IS NOT THE PROPER CASE IN WHICH TO DO SO.

At this point, Faye Boersen concedes, stipulates and admits that the issue of paternity of the child born to Faye Boersen has not been validly decided and any finding on such point by the trial court is not res judicata. Faye Boersen makes this statement because the issue of paternity was never raised by Faye Boersen's Petition (A. 1). It was not intended to be an issue in the case and as far as Faye Boersen is concerned, it is subject to future litigation and a judicial determination by separate action at any time. What has been decided is the issue of whether or not the marriage between the parties was valid or a nullity (A. 50).

On the annulment issue, Petitioner's appeal to the Nebraska Supreme Court is without merit and is frivolous. The law is well established in Nebraska that a marriage is void when one of the parties to the marriage contract is already married. See *Scott v. Scott*, 153 Neb. 906, 46 N.W. 2d. 627 (1951). This rule of law was later affirmed as recently as 1961 in *Copple v. Bowlin*, 172 Neb. 467, 110 N.W. 2d. 117 (1961). It is also clear that under Nevada law when the marriage was entered into, it was a void marriage in Nevada. Under Nevada Statutes Section 125.290 it is stated that a marriage is prohibited by law on account of either one of the persons having a wife or husband then living and that said marriage is void without decree, divorce, annulment or other legal proceeding.

Faye Boersen was married to Richard Boersen when the marriage contract was entered into between Faye Boersen and Harold Huffman (A. 60). Huffman has never denied this fact. It is well settled that the marriage was void. Huffman's appeal on the annulment issue is entirely frivolous and the Court should not accept such a frivolous appeal as the basis for extended *Boddie* to appellate litigation. This is another reason why Huffman's right to appeal this

case does not reach the "fundamental" level required by *Boddie.*

The primary question in the case at bar is whether or not the appeal bond requirement is unconstitutional and also whether or not Harold Huffman has a right to an appellate hearing without complying with the bond requirement. The questions of right to counsel and right to appear at trial at State expense might be considered in deciding whether or not the appeal is frivolous. If the Court accepts Faye Boersen's position that the issue of paternity has not been validly litigated and limits the issue in this case to one of annulment, it is clear that the appeal is not meritorious. Appearance of counsel or appearance of Harold Huffman would not change the fact that Faye Boersen was a married woman when she married Harold Huffman and under the clear law of the State of Nebraska, the marriage was void from the inception.

V. EVEN IF THE COURT FINDS THAT THE APPEAL BOND REQUIREMENT IS UNCONSTITUTIONAL AS APPLIED TO HUFFMAN, THE STATE'S POLICY OF PROTECTION TO FAYE BOERSEN SHOULD BE CONTINUED BY ALTERNATIVE METHODS.

Faye Boersen is presently without sufficient funds to pay her attorney and is without sufficient funds to pay the printing costs in the Nebraska Supreme Court or this Court. She could probably borrow sufficient money to pay the printing costs in the Nebraska Supreme Court. She was able to pay the necessary filing fee of $26.00 and the service of process fees in this case at trial court level. She, as well as Huffman, is entitled to some protection. It would not be fair in this case to allow the financial statutory protection to be removed from her without substituting some type of protection in exchange. Without the bond requirement, Faye Boersen has no chance of collecting her brief printing expenses from Huffman, who is indigent.

If Huffman loses and does not have to post the bond on appeal the reverse discrimination against people with money as mentioned by Justice Harlan dissenting in *Griffin v. Illinois*, 351 U.S. 12 (1956), would be very real to Faye Boersen. Faye Boersen suggests that there are two ways to protect her: (1) The Court could waive the printed brief requirements and allow Faye Boersen to file a typewritten brief in the Nebraska Supreme Court thus relieving her of her court costs. This would remove the financial burden to her. The other method is to allow Harold Huffman to pay the costs by an installment method secured by an assignment of his prison wages which are thirty cents per day (A. 10). See Goodpaster, *The Integration of Equal Protection, Due Process Standards and the Indigent's Right of Free Access to the Courts*, 56 Iowa L. Rev. 223, 259 (1970).

The Nebraska Legislature has now acted in this area. Legislative Bill 1120 (attached as Appendix A to this Brief) was passed with the emergency clause on March 20, 1972. It became effective the day Governor J. J. Exon signed it which was March 21, 1972. This legislation now effectively covers situations such as the one in this case. This Bill is not retroactive but it does point out that Nebraska should be given the right to handle this type of matter by legislative process, which has now been done. See Comment, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 Harv. L. Rev. 435, 442-446 (1967).

CONCLUSION

For the reasons stated, it is respectfully submitted that the Order of the Nebraska Supreme Court dismissing Huffman's appeal should be affirmed or in the alternative, if the decision of the Nebraska Supreme Court is reversed, Respondent prays that some alternative financial protection be granted to her.

Respectfully submitted,

VINCENT L. DOWDING
216 North Cedar Street
Grand Island, Nebraska 68801
Counsel for Respondent

APPENDIX A

LEGISLATURE OF NEBRASKA
EIGHTY-SECOND LEGISLATURE
Second Session

Legislative Bill 1120
Final Reading

Introduced by Judiciary Committee, Roland Luedtke, 28th District, Chairman; Harold D. Simpson, 46th District; Walter H. Epke, 24th District; John W. DeCamp, 40th District; Fred W. Carstens, 30th District; Ernest Chambers, 11th District; Terry Carpenter, 48th District; P. J. Morgan, 4th District

Read first time January 4, 1972
Referred to committee on Judiciary
Sent to printer January 5, 1972
Final form sent to printer March 16, 1972

A BILL

FOR AN ACT to establish proceedings in forma pauperis in the State of Nebraska; to provide for violations; and to declare an emergency.

Be it enacted by the people of the State of Nebraska,

Section 1. Any court of the State of Nebraska, or of any county or municipality shall authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security, by a person who makes an affidavit that he is unable to pay such costs or give security. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

Sec. 2. In any civil or criminal case the court shall, upon filing of a like affidavit, direct the responsible officer of the court to issue and serve all the necessary writs, process and proceedings, and perform all such duties without charge.

Sec. 3. In any civil or criminal case the court shall, upon filing of a like affidavit, direct that the expense of process by publication, if such process is required by the court, be paid by the county in the same manner as other claims are paid.

Sec. 4 In any civil or criminal case the court may, upon the filing of a like affidavit, order witnesses to be subpoenaed, if the court finds that they have evidence material and necessary to the case, and that they are within the judicial district in which the court is held, or within one hundred miles of the place of trial. In such case the process and the fees of the witnesses shall be paid by the county in the same manner as other claims are paid.

Sec. 5. In civil or criminal case the court shall, upon filing of a like affidavit, direct that the expenses of printing the record on appeal, if such printing is required by the appellate court, be paid by the county in the same manner as other claims are paid.

Sec. 6. In any civil or criminal case the court shall, upon filing of a like affidavit, order transcripts to be furnished without cost if the suit or appeal is not frivolous, but presents a substantial question, and if the transcript is needed to prepare, present or decide the issue presented by the suit or appeal. Such costs shall be paid by the county in the same manner as other claims are paid.

Sec. 7. In any civil or criminal case on appeal, upon the filing of a like affidavit, the court shall direct that the expense of printing of the appellate briefs, if such printing

is required by the court, be paid by the county in the same manner as other claims are paid.

Sec. 8. The court may dismiss the case or permit the affiant to proceed upon payment of costs if the allegation of poverty is untrue, or if the court is satisfied that the action is frivolous or malicious.

Sec. 9. In the event any person prosecutes or defends an action or proceeding in forma pauperis successfully, any and all cost deferred by the court under the provisions of this act shall be first satisfied out of any money paid in satisfaction of judgment.

Sec. 10. Anyone who fradulently invokes the privileges of this act shall be guilty of perjury and shall, upon conviction thereof, be punished as provided in section 28-701, Reissue Revised Statutes of Nebraska, 1943.

Sec. 11. Since an emergency exists, this act shall be in full force and take effect, from and after its passage and approval, according to law.

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In The

Supreme Court of the United States

October Term 1971

No. 71-5097

HAROLD EUGENE HUFFMAN,

Petitioner,

vs.

FAYE I. BOERSEN,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Nebraska

REPLY BRIEF OF PETITIONER

LEO EISENSTATT
707 City National Bank Bldg.
Omaha, Nebraska 68102
Attorney for Petitioner

OF Counsel:
J. PATRICK GREEN and
STEVEN M. LUTTBEG

COCKLE PRINTING CO., 1822 ST. MARY'S AVE., OMAHA

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REPLY BRIEF OF PETITIONER

ARGUMENT

I.

Nebraska's requirement of a cost bond, in its Application to Huffman, denies him due process and equal protection of the law, since it denied him access to Nebraska's Supreme Court solely upon the basis of his inability to post a bond.

Respondent argues (beginning at page 4 of her brief) that the State of Nebraska has the right to establish reasonable requirements to protect winning civil litigants on appeal against court costs. This proposition is incontestable, provided that the proper caveat is added to the proposition. That caveat, as laid down by this Court's opinion in *Lindsey v. Normet*, — U. S. —, 31 L. Ed. 2d 36, 53 (1972), is that these requirements must be "reasonably tailored to achieve these ends" and must be "uniformly and nondiscriminatorily applied." The bond requirement of the State of Nebraska, even if reasonable upon its face, runs afoul of this caveat as applied to an indigent, since it has the effect of totally barring him from the State's appellate court.

Respondent says that *Cohen v. Beneficial Industrial Loan Corporation*, 337 U. S. 541 (1949), disposes of this case in her favor. In *Cohen* this Court had occasion to consider a challenge to a bond requirement upon its face, not a challenge to the constitutionality in application to an indigent. This Court made precisely that distinction of *Cohen* in *Boddie v. Connecticut*, 401 U. S. 371, 381, fn. 9, where it said that:

> "We think Cohen v. Beneficial Finance Corp., 337 U. S. 541 (1949), has no bearing on this case. Differences, between divorce actions and derivative actions aside, unlike Cohen, where we considered merely a statute on its face, the *application* of this statute here operates to cut off entirely access to the courts."

Cohen is distinguishable upon another basis. *Cohen* does not address itself to the validity of a cost security required to protect the adverse party in litigation. Rather

in *Cohen*, the bond required was to be posted by the shareholders suing on behalf of their corporation to protect the corporation, the party in whose behalf they acted, from loss which would result if the suit was unfounded. This distinguishing factor enervates *Cohen* of precedential value in the context of a bond required to protect the adverse party to the litigation. This distinction was noted by the Court in *Lindsey v. Normet*, 31 L. Ed. 2d 36, fn. 26, wherein the court stated that:

> "Cohen v. Beneficial Finance Corp., 337 U. S. 541 (1949), is distinguishable from the instant case. There, the Court upheld a state law which required a shareholder who wished to file a shareholder's derivative suit but who owned less than 5% of the corporation's stock or whose stock was worth less than $50,000 to file as a precondition to bringing the suit a bond for the reasonable expenses, including attorney's fees, that might be incurred by defendants. The security requirement there applied to a *plaintiff* and its purpose was to protect the corporation from being injured by 'strike suits' which harmed the very interests that plaintiffs claimed to be protecting."

Respondent argues (at page 7 of her brief) that:

> "If the Court invalidates the appeal bond requirement herein without an alternative remedy, it is forcing the abandonment of the state's policy of protection of civil litigants or it is requiring the state to pay the winner out of state funds, or it is forcing the state to abandon the policy of taxing the court costs against the loser."

This argument is invalid on several grounds. Firstly, no claim is made that the requirement of a bond is unconstitutional on its face. Therefore, invalidation of the bond requirement is sought only insofar as it applies to

the indigent. In all other cases the State's bond requirement would still obtain. Nor, do we see how there would be any compulsion upon the State to pay the costs of the winner out of state funds. Nebraska, in common with most States, generally taxes costs in favor of the prevailing party on an appeal. When the appellant wins, costs are generally taxed in the appellant's favor. Nebraska does not require the appellee to post a bond to protect the appellant against costs. In cases where the appellant prevails, the absence of a bond requirement has not forced the State of Nebraska to abandon its policy of taxing the costs against the loser, nor has the State of Nebraska been required to pay the court costs of a winning appellant out of state funds.

In *Griffin v. Illinois*, 351 U. S. 12 (1956), this Court bottomed the indigent criminal defendant's right to free appeal, at least in part, upon the defendant's due process right to be heard in the trial court. The Court noted that once the initial right to access was established, if the appellate process was part of the total judicial process to adjudicate the type of issue involved, a party could not, upon the basis of inability to pay costs, be barred from the appellate process. In *Boddie v. Connecticut*, supra, this Court established the initial right to free access of a party seeking to have the marital relationship dissolved. *Boddie* and *Griffin* in tandem then would mandate the extension to a party in a matrimonial proceeding of the right to a free appeal required by *Griffin*.

However, respondent seeks to distinguish *Boddie* upon the basis that, while the party seeking a divorce has a fundamental right to access to the courts, the other

party to the marital relationship, if he seeks to defend the bond of matrimony, has no such fundamental right. Thus, respondent (at page 8 of her brief) argues that:

> ". . . Does Harold Huffman have a fundamental right to litigate the validity of his marriage to Faye Boersen on appeal? What Harold Huffman seeks to maintain in this action is an alleged marriage to a woman that won't live with him even after he finishes his term in the Nebraska Penal Complex. This would not appear to be the type of 'fundamental' right that the Court should seek to protect by guaranteeing an appellate hearing."

The fundamental right which *Boddie* sought to protect was the right of access to the courts to litigate "the adjustment of a fundamental human relationship", matrimony, which only the courts of the State could grant. Each party to the marriage is a party to the fundamental relationship or else there would be no relationship but only a status. Only the courts of a state may say that the relationship exists or does not exist. Just as there is no tribunal other than a state court which can dissolve a marriage, there is no tribunal other than a state court which can establish that a matrimonial relationship exists. The marriage relationship is no less a fundamental human relationship, when a party desires that it continue, than it is when a party desires that it be terminated.

Respondent argues (at pages 10 and 11) that *Lindsey v. Normet*, supra, indicates that the doctrine of *Griffin v. Illinois*, supra, should not be extended to civil litigation. This is a complete misreading of *Lindsey*. *Lindsey* recognized the validity of "reasonable procedural provisions

to safeguard litigated property, . . . or to discourage patently insubstantial appeals, if these rules are reasonably tailored to achieve these ends and if they are uniformly and nondiscriminatorily applied . . ." (31 L. Ed. 2d at page 53). However, the Nebraska cost bond provision serves neither of the purposes validated by *Lindsey*, nor is it nondiscriminatorily applied. The provision does not safeguard property in litigation, nor does it guard a damage award already made, but rather seeks only to protect an appellee from costs which may be awarded, if the appellant does not prevail on appeal. Nor, is the cost bond provision tailored to discourage patently insubstantial appeals. Rather, the same vice inheres in it which inhered in the double bond provision in *Lindsey*. As this Court noted in *Lindsey*:

> "The claim that the double-bond requirement operates to screen out frivolous appeals is unpersuasive, for it not only bars nonfrivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford the bond." (31 L. Ed. 2d at p. 53).

Other statements which the Court made with regard to the double appeal bond are applicable by analogy here. Thus, at a later point in its opinion this Court stated that:

> "In the case before us, however, the State has not sought to protect a damage award or property an appellee is rightfully entitled to because of a lower court judgment. Instead, it has automatically doubled the stakes when a tenant seeks to appeal an adverse judgment in an FED action. The discrimination against the poor, who could pay their rent pending an

appeal but cannot post the double bond is particularly obvious. For them, as a practical matter, appeal is foreclosed, no matter how meritorious their case may be." (31 L. Ed. 2d at pages 53 and 54).

Respondent argues (at page 10) that to allow free appeals to those who are unable to pay constitutes a discrimination against those who can pay, who are, therefore, required to do so. That a discrimination is involved in such a situation can hardly be doubted. However, the Equal Protection Clause does not condemn discrimination, but only invidious or unreasonable discrimination. *Linsley v. Natural Carbonic Gas Company*, 220 U. S. 61, 78 (1911); *McLaughlin v. Florida*, 379 U. S. 184, 188-192 (1964). A requirement of payment does not bar those who can pay from utilizing a state service for which a charge is made. However, such a requirement does bar one who has no money from utilizing the service. The interest of the state in recouping the cost of services which it provides is strong enough to justify a requirement of payment, where ability to pay exists, without being strong enough to justify a requirement of payment, where payment is impossible. This is the burden of cases such as *Griffin v. Illinois*, and its progeny, which have condemned various state cost requirements in criminal cases as discriminatory when applied to the poor, but which have not voided such requirements upon their face. Discrimination there may be if some pay and others do not, but, if the discrimination is based upon the fact that some can pay while others cannot, is not unreasonable.

Respondent further argues (at page 10) that if the right to a free appeal (fees and cost security) is extended

to the indigent in civil cases then perhaps the states will be required to subsidize counsel for the poor in civil litigation and that all state charges for services such as tuition, license fees, and the like may be in jeopardy. This potential jeopardy arose when this Court recognized that discrimination based upon poverty was impermissible in *Griffin v. Illinois*, supra, and *Harper v. Virginia*, 383 U. S. 663 (1966). When the payment of any one fee was condemned, the potential arose that the payment of all fees might be condemned. If the argument that extending a free appeal to the indigent in civil cases might one day lead to the invalidation of all state charges for services is a valid ground for not extending *Griffin* and *Harper*, it was equally a valid ground for not deciding *Griffin* and *Harper* the way they were decided. The *in terrorem* argument that the extension of one service for free may ultimately lead to a requirement that all services be extended for free, is as applicable to the rulings in *Griffin* and *Harper*, as it is to the ruling petitioner seeks in this case.

However, the condemnation of all fees does not follow with ineluctable logic from the condemnation of any one fee. A line may have to be drawn between those instances in which equal protection does require the State to extend free services to the indigent, and those in which it does not. However, that a line needs to be drawn does not establish in any particular case on which side of the line a service falls.

If the line needs to be drawn now, which we doubt, it can be drawn by analogy to this Court's rulings in *Harper v. Virginia*, supra, and *Shapiro v. Thompson*, 394

U. S. 618 (1969). In each of these cases this Court condemned a classification in a statute because of its substantial deterent impact on the exercise of a fundamental right. A line based upon the fundamental character of the right denied to an indigent person because of inability to pay would provide one rational way of limiting the operation of the principle which condemns discrimination based on poverty. Because of the central role which the courts play in our political system, access to the courts is a fundamental right. It is the legal analogue to the franchise, and its exercise deserves the same protection from discrimination based upon poverty as does the exercise of the franchise. As Mr. Justice Black observes in his opinion dissenting from this Court's denial of certiorari in *Meltzer v. C. Buck LeCraw & Co.*, — U. S. —, 29 L. Ed. 2d 124, 125 (1971):

> "In my view, the decision in Boddie v. Connecticut can safely rest on only one crucial foundation—that the civil courts of the United States and each of the States belong to the people of this country and that no person can be denied access to those courts, either for a trial or an appeal, because he cannot pay a fee, finance a bond, risk a penalty or afford to hire an attorney."

Respondent, throughout her brief, argues in terms of the extension of a free right of appeal to the indigent and we have dealt with the argument in that vein. However, the issue here is not whether the indigent's right to appeal should be free or not, but whether prepayment should be a condition to the right to appeal. The equal protection bars the imposition of a hurdle, such as payment in advance, to the extent that it bars the indigent from the appellate courts. However, the Equal Protection

Clause does not bar States from creating reasonable alternative procedures to assure payment of costs by indigent parties. In Nebraska, as in most States, costs partake of the nature of a judgment and are collectable in the same manner as any other judgment. Appellants, who prevail on appeal in the Nebraska courts, do not have the benefit of a bond requirement. However, they have means available to collect costs awarded to them. In addition to the ordinary means for collecting judgments, the States could adopt other steps to assure that indigent parties eventually pay costs awarded against them, or at least to protect appellees against the loss occasioned by an indigent appellant's failure to pay such costs. On page 14 of her brief, respondent notes at least two methods which might be utilized to protect an appellee from costs. One is the simple expedient of allowing the appellee, in a case where a cost bond is not required in advance, to file a typewritten brief, since printing costs are the principal costs involved in an appeal in Nebraska. Another potential method is installment payment. Other methods might suggest themselves to the State Legislatures, once they are faced with the reality that indigent parties are not required to post bonds in advance of an appeal.

II.

Contrary to the suggestion of respondent, this is a proper case in which to extend the Boddie principle to litigation between private parties on appeal.

Respondent argues that this is not a proper case in which to extend the *Boddie* principle because Huffman's appeal to the Nebraska Supreme Court was frivolous and

without merit. The claim that the appeal was frivolous is based upon a record made at an ex parte hearing at which Huffman had no opportunity to appear, in which he offered no evidence, and at which he was not represented by counsel. This Court should not, upon the basis of a record made up by only one party to the litigation determine that the other party could not make out a case if given an opportunity to do so.

In addition, the issue of paternity, contrary to respondent's suggestion, was determined by the Nebraska District Court, and Huffman has no alternative remedy available in which he could litigate the issue of paternity.

The right to bring an action under the Nebraska Child Born Out of Wedlock Statute (Sec. 13-113, R. R. S. 1943, Nebraska) is specifically limited to an action by the mother. In *Poltini v. Creel*, 169 Neb. 591, 100 N. W. 2d 736 (1960), the Nebraska Court held that the petition by a father for declaration of his parental status as to children born out of wedlock was a legal nullity because of a lack of specific statutory authority. If the sole purpose of the action is the determination of paternity, 13-113, supra, is literally applied.

However, in an action for annulment, the father may raise the issue of paternity and the court may make such determination.

In *Timmerman v. Timmerman*, 163 Neb. 704, 81 N. W. 2d 135 (1951), our Nebraska court held that the Nebraska annulment statute authorized the court to determine paternity where it had declared the marriage a nullity. At page 140 the court stated:

"By the terms of section 42-311, R. R. S. 1943, the court was specifically empowered, in the event that the marriage was decreed to be a nullity, to make provision for the care, custody, and maintenance of any child or children of the parties. It is but a matter of reason and logic to say that the power could not be exercised in the absence of proof of the fact that there was a child or there were children. It is likewise true that proof of paternity could be accomplished by admission of the father.

"The question arises, as applied to this case, as follows: Was the court empowered to determine the question of paternity other than by an adjudication made pursuant to section 13-106 or 13-113, R. R. S. 1943 . . .

"We think that the answer must be that the court had the power . . ."

For respondent to say that paternity cannot be considered because she did not raise the issue or "It was not intended to be an issue in the case . . ." (at page 12) is without substance. Once a plaintiff files an action, the law not the plaintiff establishes what issues can or cannot be litigated.

CONCLUSION

For the reasons stated, it is respectfully submitted that the order of the Nebraska Supreme Court dismissing Huffman's appeal should be reversed.

Respectfully submitted,

LEO EISENSTATT

707 City National Bank Bldg.
Omaha, Nebraska 68102

Counsel for Petitioner

Of Counsel:

J. PATRICK GREEN

STEVEN M. LUTTBEG

April 10, 1972.

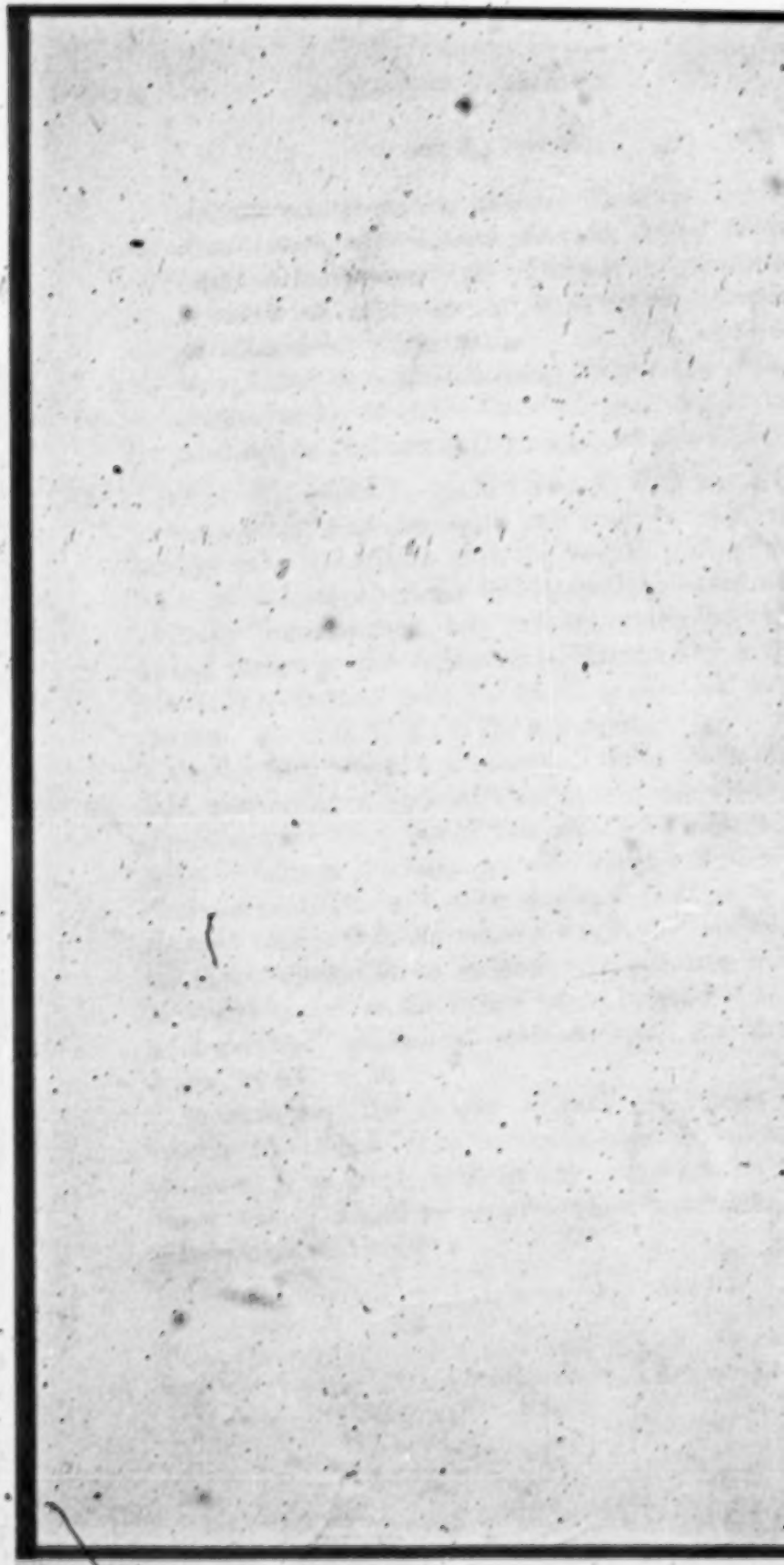
CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of April, 1972, three copies of the Reply Brief for Petitioner were mailed, postage prepaid, to Vincent L. Dowding, Esq., P. O. Box 1192, Grand Island, Nebraska 68801, counsel for Respondent. I further certify that all parties required to be served have been served.

LEO EISENSTATT

707 City Natl. Bank Bldg.
Omaha, Nebraska 68102

Counsel for Petitioner



HUFFMAN v. BOERSEN

CERTIORARI TO THE SUPREME COURT OF NEBRASKA

No. 71-5097. Argued April 19, 1972—Decided May 15, 1972

Judgment dismissing indigent petitioner's appeal for failure to deposit cash or security for costs required of appellants vacated to afford the state court an opportunity for reconsideration in the light of supervening legislation enacted after certiorari was granted. Vacated and remanded.

Leo Eisenstatt, by appointment of the Court, 404 U. S. 998, argued the cause and filed briefs for petitioner.

Vincent L. Dowding argued the cause and filed a brief for respondent.

PER CURIAM.

We granted certiorari to review the constitutionality of Neb. Rev. Stat. § 25-1914 (1964)[1] under which the Nebraska Supreme Court dismissed this indigent petitioner's appeal for his failure to deposit the $75 cash or bond security for costs required of appellants by the statute. 404 U. S. 990 (1971). The judgment appealed from annulled petitioner's marriage to respondent and dismissed his countersuit claiming paternity and custody of a child born to respondent. After our grant of certiorari, Nebraska enacted Legislative Bill 1120 providing, among other things, that the Nebraska courts "shall authorize . . . [an] appeal . . . without pre-

[1] "On appeal in any case taken from the district court to the Supreme Court the appellant . . . shall, within one month next after the rendition of the judgment or decree . . . sought to be reversed, vacated or modified, . . . file in the district court a bond or undertaking in the sum of seventy-five dollars to be approved by the clerk of the district court, conditioned that the appellant shall pay all costs adjudged against him in the Supreme Court; or, in lieu thereof, shall make a cash deposit with said clerk of at least seventy-five dollars for the same purpose . . . ."

payment of . . . security, by a person who makes an affidavit that he is unable to . . . give security . . . ," except that "[a]n appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good faith." Counsel for both parties were of the opinion on oral argument here that this new statute is applicable to the instant case. Counsel for respondent also conceded that petitioner's appeal on the paternity issue has merit.[2] Accordingly, the judgment is vacated and the cause remanded to the Nebraska Supreme Court for reconsideration in light of the supervening statute.

It is so ordered.

MR. JUSTICE DOUGLAS, concurring.

While I agree to either reversing the judgment below or vacating and remanding, I do so on somewhat different grounds.

This case is clearly controlled by *Boddie* v. *Connecticut*, 401 U. S. 371. It involves, not a divorce, but an annulment and a claim concerning the paternity and custody of a child. The principles announced in *Boddie* are therefore clearly applicable no matter how closely *Boddie* is confined.[1]

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[2] "Q. You told us today that you concede that the determination of the paternity question was insufficient, invalid I think is the word you used.

"Mr. Dowding. Yes, I'm willing to agree that [petitioner] did not have his day in court on the paternity issue.

"Q. And we could say so on a remand.

"Mr. Dowding. Yes. So stipulate." Tr. of Oral Arg. 40.

[1] I share the view of Justice Black, however, that

"the decision in *Boddie* v. *Connecticut* can safely rest on only one crucial foundation—that the civil courts of the United States and each of the States belong to the people of this country and that no person can be denied access to those courts, either for a trial or an appeal, because he cannot pay a fee, finance a bond, risk a penalty or afford to hire an attorney. . . .

What the Supreme Court of Nebraska may do about the new statute that has recently been enacted is its business and not ours. The parties before us cannot by their agreement make that statute applicable. Only the Supreme Court of Nebraska can do so, and we cannot direct that court to reconsider this case in light of the supervening statute.[2] The Supreme Court of Nebraska is sovereign in its own right in connection with local law matters. *Boddie* contains the guiding federal principle and that principle alone should control the disposition that we make of the case.[3]

"[T]he crucial foundation on which *Boddie* rests also forbids denial of an indigent's right of appeal in civil cases merely because he is too poor to pay appeal costs. Once the right to unhampered access to the judicial process has been established, that right is diluted unless the indigent litigant has an opportunity to assert and obtain review of the errors committed at trial." *Meltzer* v. *LeCraw & Co.*, 402 U. S. 954, 955–956, 958 (opinion of Black, J.).

[2] Some States do have procedures by which federal appellate courts may certify questions of law to the state supreme court. Florida is one. See *Diffenderfer* v. *Central Baptist Church*, 404 U. S. 412, 415 (DOUGLAS, J., dissenting). Nebraska has no such procedure.

[3] It is possible that the Nebraska Supreme Court will have no opportunity, despite the remand, to rule on the applicability of the new statute to petitioner. Legislative Bill 1120 provides that "[a]n appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good faith." In the federal system, "good faith" has "been defined as a requirement that an appeal present a nonfrivolous question for review." *Cruz* v. *Hauck*, 404 U. S. 59, 62 (DOUGLAS, J., concurring). Here, respondent urges strenuously that the annulment issue is indeed frivolous. While counsel is willing to stipulate that there is merit to the paternity issue, the effect of such a stipulation on the views of the trial judge, who is on record as believing petitioner's assertions to be "wholly without merit," App. 49, is highly speculative.

Should petitioner's *in forma pauperis* appeal be disallowed because of the trial court's certification of the appeal as frivolous, I would hold that petitioner had been denied the equal protection of the laws. *Cruz* v. *Hauck*, *supra*.